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Supreme Court of the United States

OCTOBER TERM, 1940

No. 147

**NEW JERSEY REALTY TITLE INSURANCE
COMPANY, APPELLANT.**

DIVISION OF TAX APPEALS IN THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW JERSEY AND THE CITY OF NEWARK

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

FILED JUNE 28, 1940.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 147

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COMPANY, APPELLANT,

vs.

DIVISION OF TAX APPEALS IN THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW JERSEY AND THE CITY OF NEWARK

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IN SUPREME COURT OF NEW JERSEY

On Appeal from New Jersey Supreme Court.

Sat below: Bodine and Heher, J.J.

NEW JERSEY REALTY TITLE INSURANCE COMPANY, Prosecutor-Appellee,

vs.

DIVISION OF TAX APPEALS IN THE DEPARTMENT OF TAXATION and Finance of the State of New Jersey, and the City of Newark, a Municipal Corporation, Respondents-Appellants**Appendix to Appellants' Brief**[fol. 1] **IN NEW JERSEY SUPREME COURT****WRIT OF CERTIORARI****STATE OF NEW JERSEY, ss:**

The State of New Jersey to the Division of Tax Appeals in the Department of Taxation and Finance of the State of New Jersey—(L.S.)

GREETINGS:

We being willing, for certain reasons, to be certified of a certain judgment of the Division of Tax Appeals in the State Department of Taxation and Finance, dated April 22, 1947, dismissing the appeal of New Jersey Realty Title Insurance Company from the assessment of \$75,700.00 levied by the City of Newark for the year 1945 on personal property of New Jersey Realty Title Insurance Company located at No. 830 Broad Street, Newark, New Jersey, do command you that you certify and send under your seal, to our Justices of our Supreme Court of Judicature, at Trenton, on the 2nd day of March, 1948, the said judgment of said Division of Tax Appeals, together with proceedings, testimony, exhibits and all things touching and concerning the same, as fully and completely as they remain before you, together with this our writ, that we may cause to be done

thereupon what of right and justice and according to the laws of the State of New Jersey ought to be done.

Witness, Honorable Clarence E. Case, Chief Justice of our Supreme Court, at Trenton, this 11th day of February, One Thousand Nine Hundred and Forty-eight.

James J. Gavin, Clerk.

Charles B. Niebling, Attorney for Prosecutor.

[fol. 2]

ALLOCATUR

This writ allowed by Opinion filed February 3, 1948.

IN NEW JERSEY SUPREME COURT

REASONS FOR REVERSAL—Filed March 10, 1948

The said prosecutor, by its attorney prays that the judgment of the Division of Tax Appeals in the Department of Taxation and Finance, dated April 22, 1947, dismissing the appeal of prosecutor from an assessment of \$75,700 levied by the City of Newark on personal property of prosecutor for the year 1945, may be set aside, reversed and for nothing holden, for the following reasons:

1. Section 54:4-22 of the Revised Statutes, as amended by P. L. 1938, c. 245, under which said assessment was made, is unconstitutional insofar as application of the proviso thereof, providing for a minimum assessment of 15 per cent of the paid-up capital and surplus of stock insurance companies, operates to impose a direct tax upon bonds of the United States owned by prosecutor, which are immune from state and local taxation.
2. Section 54:4-22 of the Revised Statutes, as amended by P. L. 1938, c. 245, under which said assessment was made, is unconstitutional in that said statute, in subjecting the intangible personal property of stock insurance companies to taxation by a special method of assessment, makes an arbitrary classification resulting in unequal and discriminatory taxation, in contravention of the Fourteenth Amendment to the Constitution of the United States and the Constitution of the State of New Jersey.
3. If section 54:4-22, as amended, is invalid in its entirety, the said assessment against prosecutor is illegal and void

and should be set aside and cancelled, for the reason that prosecutor was not subject to personal property taxes by the City of Newark for the year 1945 under any applicable taxing statutes.

4. If section 54:4-22, as amended, is invalid only in respect to the operation of the proviso thereof in imposing a direct tax upon United States bonds owned by prosecutor, the judgment of the Division of Tax Appeals was erroneous in that the said assessment of \$75,700 should have been reduced by excluding and eliminating the amount of such United States bonds from the capital and surplus of prosecutor against which the 15 per cent minimum assessment was calculated.

5. The said assessment, affirmed by the judgment of the Division of Tax Appeals as aforesaid, is in divers other respects unjust, illegal and void, and should be set aside and cancelled.

Dated: March 10, 1948. —

Charles B. Niebling, Attorney for Prosecutor.

[fol. 4] IN NEW JERSEY SUPREME COURT

RETURN TO THE WRIT

The Division of Tax Appeals in the Department of Taxation and Finance doth herewith send to the Supreme Court of the State of New Jersey the petition, judgment and proceedings in the matter of the appeal of New Jersey Realty Title Insurance Company, from the assessment of personal property situate in the City of Newark, County of Essex, for the year 1945, as within it is commanded, as by the transcript under the seal of said Division hereto annexed more fully appears.

Division of Tax Appeals, By Chas. E. Cook, Secretary. (Seal.)

BEFORE DIVISION OF TAX APPEALS, DEPARTMENT OF TAXATION
AND FINANCE

PETITION OF APPEAL.

To the Division of Tax Appeals, in the State Department of Taxation and Finance:

Your petitioner, New Jersey Realty Title Insurance Company residing at (P.O. address), 830 Broad Street, Newark 1, in the County of Essex and State of New Jersey respectfully shows that petitioner is the owner of certain property situated in the taxing district of Newark, County of Essex, consisting of

(See attached copy of return filed with Board of Assessment and Revision of Taxes, Department of Revenue and Finance, Newark, New Jersey, December 2, 1944)

[fol. 5] and known as

That said property has been assessed for the purpose of taxation for the year 1945 at a valuation of * Land, — ; Improvement, \$ — ; Personal, \$75,700.00; Total, \$75,700.00 at which assessment you petitioner is aggrieved, because the said assessment is in excess of its true value.

That an appeal from said assessment has been filed with the Essex County Board of Taxation, which appeal said Board disposed of as follows:

See copy of Determination attached hereto and included herein and marked Schedule 1.

Your petitioner, therefore, prays that said assessment of ** Land, \$ — ; Impt., \$ — ; Pers., \$75,700.00; Total, \$75,700.00, for the year 1945, be reduced to the true value of the property, to wit; Land, \$ — ; Impt., \$ — ; Pers., \$ None; Total, \$ None because of and for the reasons set

* This amount should be the original valuation of the property as it appears on the tax bill.

** This amount should be the valuation to which the assessment was changed by the County Board of Taxation, on appeal.

forth in the schedule attached hereto and made a part hereof and included herein and marked schedule #2.

New Jersey Realty Title Insurance Company,
(Signed) Hilmer J. Anderson, Treasurer.

Dated Dec. 13, 1945.

[fol. 6] *Duly sworn to by Hilmer J. Anderson. Jurat omitted in printing.*

SCHEDULE 1

ESSEX COUNTY BOARD OF TAXATION

APPEARANCES:

For the Petitioner: James J. McCarthy, Esq., and Hilmer Anderson, Esq.

For the Respondent: Thomas L. Parsonnet, Esq., Corporation Counsel of the City of Newark, by Vincent J. Casale, Esq., Assistant Corporation Counsel.

Petitioner has filed its petition of appeal, praying exemption from assessment on personal property imposed by the taxing district of the City of Newark, on the ground that [fol. 7] the Act under which the assessment has been made by the City of Newark is unconstitutional.

We think that the application should be made to a tribunal, other than the Essex County Board of Taxation, in order to determine the constitutional question, the solution of which is the basis for the claim of the Petitioner for exemption from taxation, and the claim of the City of Newark that the tax should be imposed.

Essex County Board of Taxation, (Signed) Charles Hood, President; Max Drill, Herbert H. Eber, John F. Coogan, Jr., Joseph L. Magrino.

Dated: November 14, 1945.

(Signed) Edward D. Balentine, Secretary.

[fol. 8]

SCHEDULE 2

Petitioner is subject to no tax because as indicated by the documents hereto attached and made a part hereof its assets consist of exempt and non-taxable property. Chapter 4 of Title 54 of the Revised Statutes of New Jersey is unconstitutional in so far as it purports to provide for a

tax of not less than fifteen percentum of the sum of the paid up capital and surplus of petitioner in excess of the total of all liabilities of petitioner in that said provision in effect levies a tax upon non-taxable and exempt securities owned by petitioner and results in unequal and discriminatory taxation.

New Jersey Realty Title Insurance Company, Signed
Hilmer J. Anderson, Treasurer.

[fol. 9]

**PERSONAL PROPERTY RETURN OF STOCK INSURANCE COMPANY FOR YEAR 1945
UNDER SECTION 54: 4-22 OF REVISED STATUTES**

(As Amended by Chapter 245, Laws of 1938)

Name of Company New Jersey Realty Title Insurance Company

Address 830 Broad Street, Newark, New Jersey

| | |
|---|--------------|
| 1. Total Assets (including assets not admitted) (Attach Balance Sheet as Schedule A) | \$774,972.98 |
| Deduct: | |
| 2. Real Estate (Book Value) | None |
| 3. Tangible Personality | None |
| 4. Total Intangible Assets (Item 1 less sum of Items 2 and 3) | \$774,972.98 |
| Deduct: | |
| 5. All Shares of Stock (Book Value)— Schedule B | None |
| 6. Exempt and Non-Taxable Property (Book Value)—Schedule C | \$770,454.20 |
| 7. Total Taxable Intangibles (Item 4 less sum of Items 5 and 6) | \$ 4,518.78 |
| Deduct: | |
| 8. Debts and Liabilities Certain— Schedule D | \$ 25,756.63 |
| 9. Reserves for Taxes—Schedule D | \$ 28,175.46 |
| 10. Proportion of Loss and Premium | \$ 758.13 |
| Reserves and Other Liabilities Uncertain— Schedule E | |
| 11. Tentative Assessment (Item 7 less sum of Items 8, 9 and 10) | \$ 54,696.22 |
| 12. Minimum Assessment (15% of sum of Capital and Surplus after deducting Real Estate Assessments and other Tax Exempt and Non-Taxable Securities. Use last annual statement) | None |
| 13. Intangible Personality Assessment (Item 11 or 12, whichever is higher) | None |
| 14. Tangible Personality Assessment | None |
| 15. Personal Property Assessment (sum of Items 13 and 14) | None |

[fol. 10]

New Jersey Realty Title Insurance Company

Balance Sheet

September 30, 1944

Assets

Cash

| | |
|-------------------------------------|--------------|
| General Funds | \$121,024.33 |
| Trust Funds | 11,802.04 |
| F. H. A. Funds | 1,463.36 |
| S. S. Act and Withholding Tax Funds | 2,305.01 |

| |
|---------------------|
| \$121,024.33 |
| 11,802.04 |
| 1,463.36 |
| 2,305.01 |
| \$136,594.74 |

| | |
|-------------------------------|------------|
| U. S. Treasury Bonds (at Par) | 450,000.00 |
|-------------------------------|------------|

| | |
|--|-----------|
| Bonds and Mortgages Owned—Secured by Real Estate in New Jersey | 42,553.00 |
|--|-----------|

| | |
|--|-----------|
| Bonds and Mortgages Owned—F. H. A. Insured | 86,027.48 |
|--|-----------|

Accrued Interest:

| | |
|---|-------------|
| Bonds | \$ 1,682.25 |
| Mortgages | 564.84 |
| Accounts Receivable | 30,751.47 |
| Less: Reserve for Accounts Receivable | 26,232.69 |
| Title Plant located in Trenton, N. J. | 47,500.00 |
| Deferred Commissions | 3,933.92 |
| Deposits with County Clerks and Registers | 935.00 |
| Internal Revenue Stamps | 196.15 |
| Prepaid Personal Taxes | 436.82 |

| | |
|---------------------|---------------------|
| Total Assets | \$774,972.98 |
|---------------------|---------------------|

Liabilities, Reserves and Capital

| | |
|---|-------------|
| Commissions Payable | \$ 4,410.17 |
| Accounts Payable | 2,878.06 |
| Federal Income Taxes Payable | 3,298.65 |
| Social Security, Unemployment and Withholding Taxes Payable | 2,305.01 |
| Clients Trust Account | 11,802.04 |
| F. H. A. Title II Mortgage Escrow Account | 1,463.36 |
| Reserve for Title Losses | 130,711.79 |
| Reserve for Unearned Premiums | 7,427.50 |
| Special Reserve | 1,200.00 |
| Reserve for Federal Income Taxes | 28,175.46 |
| Capital Stock | 250,000.00 |
| Paid in Surplus | 250,000.00 |
| Profit and Loss Surplus | 81,300.94 |

| | |
|--|---------------------|
| Total Liabilities, Reserves and Capital | \$774,972.98 |
|--|---------------------|

[fol. 11]

Schedule B—Item 5

(Itemise shares of stock giving number, names of companies and book value)

• None

Schedule C—Item 6

(Itemize personal property claimed to be exempt, giving dates of purchase thereof, description of securities (other than stocks) with book values thereof, names of New Jersey banks and amounts of deposits therein; list all other personal property claimed to be exempt.)

| | |
|--|--------------|
| Bonds owned with accrued interest thereon (see schedule attached) | \$451,682.25 |
| Mortgages owned with accrued interest thereon (see schedule attached) | 129,175.32 |
| Deferred Commissions | 3,933.92 |
| Cash deposits with County Clerks and Registers (see schedule attached) | 935.00 |
| Internal Revenue Stamps | 196.15 |
| Title Plant located in Trenton, N. J. | 47,500.00 |
| Prepaid Personal Taxes | 436.82 |

Cash on Deposit:

| | |
|---|-------------|
| Fidelity Union Trust Company | \$34,987.94 |
| Lincoln National Bank | 3,696.49 |
| National Newark & Essex Banking Company | 15,416.24 |
| Merchants and Newark Trust Company | 41,080.69 |
| Trenton Trust Company | 37,351.13 |
| Broad Street National Bank, Trenton | 4,062.25 |

\$770,454.20

New Jersey Realty Title Insurance Company

Personal Property Tax Return for 1945

Schedule C—Item 6

| Date Purchased | Bonds Owned | Rate | Maturity | |
|------------------|--|--------|----------|--------------------|
| June 2, 1941 | United States Treasury Bonds | 2 1/2% | 1958-56 | \$ 40,000.00 |
| October 20, 1941 | United States Treasury Bonds | 2 1/2% | 1972-67 | 62,500.00 |
| May 5, 1942 | United States Treasury Bonds | 2 1/2% | 1962-67 | 47,500.00 |
| August 6, 1942 | United States Treasury Bonds | 2 1/2% | Series G | 100,000.00 |
| April 28, 1943 | United States Treasury Bonds | 2 | 1950-52 | 100,000.00 |
| April 28, 1943 | United States Treasury Bonds | 2 1/2% | 1964-69 | 100,000.00 |
| | | | | <hr/> |
| | | | | \$450,000.00 |
| | Accrued Interest on above Bonds to | | | |
| | October 1, 1944 | | | 1,682.25 |
| | Total Bonds Owned and Accrued Interest | | | <hr/> \$451,682.25 |
| | thereon | | | |

Schedule D—Items 8 and 9

(Detail debts and liabilities certain and tax reserve)

| | |
|--|-------------|
| Federal Income Tax Payable | \$3,298.65 |
| Accounts Payable (see schedule attached) | 2,856.46 |
| Commissions Payable (see schedule attached) | 4,031.11 |
| Clients' Trust Account (see schedule attached) | 11,802.04 |
| Social Security and Unemployment Taxes Payable | 2,305.01 |
| E. H. A. Title II Escrow Account | 1,463.36 |
| <hr/> Total | \$25,756.63 |
| Reserve for Federal Income Taxes | \$28,175.46 |

Schedule E—Item 10

(List loss and premium reserves and other liabilities not certain and definite as to obligation and amount. Insert as Item 10 that proportion of the total thereof which is the amount of Item 7 divided by the amount of Item 4.)

| | |
|---|--------------|
| Reserves for Losses | \$130,711.79 |
| portion of the Total of above Reserves which is the amount of Item 7 divided by the amount of Item 4 (.58%) | \$758.13 |

[fol. 13]

AFFIDAVIT.

STATE OF NEW JERSEY,
County of Essex, ss.:

John C. Thompson, President of New Jersey Realty Title Insurance Company being duly sworn, on my oath, depose and say that I am authorized to make and file the foregoing return and execute this affidavit; that this return including the accompanying schedules and statements has been examined by me and is to the best of my knowledge and belief, a true and complete return made in good faith, for the taxable year stated, pursuant to the General Tax Act of the State of New Jersey (Chapter 4 of Title 54 of the Revised Statutes) and the Regulations issued thereunder. Exemption is claimed for the personal property and securities listed in Schedule C, none of which was purchased to escape taxation.

(signed) John C. Thompson.

Subscribed and sworn to before me this 1st day of December, 1944. Herbert F. Rech, Notary Public of the State of N.J.

[fol. 14] DEPARTMENT OF TAXATION AND FINANCE, DIVISION OF TAX APPEALS

Report of Commissioners Conklin and Labreeque of cases heard January 16, 1947, at the Court House, Jersey City, New Jersey.

12. N. J. Realty Title Ins. vs. City of Newark Pers. located at the offices of the petitioner, 830 Broad St.

OPINION—Filed April 22, 1947

This is a personal property appeal wherein the petitioner attacks the constitutionality of the assessment. This is not a proper court for the determination of such a question, and therefore it is recommended that the appeal be dismissed.

Walter H. Conklin, Commissioner; Theodore J. Labreeque, Commissioner.

fol. 15] STATE OF NEW JERSEY, DIVISION OF TAX APPEALS.

Department of Taxation and Finance

JUDGMENT

A duly verified appeal in writing having been filed with the Division of Tax Appeals, by N. J. Realty Title Insurance Co. in which it is alleged that an injustice has been done the said complainant by the assessment of certain property for taxation for the year 1945, located at City of Newark in the County of Essex consisting of Personality, at No. 830 Broad St., and that said property is assessed higher than the true value thereof;

After hearing evidence produced on the part of said complainant, and the said respondent, and the argument of Charles B. Niebling, Atty. for the complainant, and Harry Pine, Atty. for the respondent and after considering the same, it is on this twenty-second day of April, nineteen hundred and forty-seven, at a session of the Division of Tax Appeals, ordered, adjudged and decreed, under and by virtue of the authority conferred by law, that the appeal from the assessment levied for the year 1945 on the above described property be and the same hereby is dismissed.

Donald M. Waesche, President; Walter H. Conklin,
W. Leslie Rogers, Chas. H. Frankenbach, Division
of Tax Appeals in the State Department of Taxa-
tion and Finance.

Attest: Chas. E. Cook, Secretary.

[fol. 16] DEPARTMENT OF TAXATION AND FINANCE, DIVISION
OF TAX APPEALS

Transcript of Hearing

Transcript of the testimony taken in the above entitled matter before Division of Tax Appeals, Commissioners Theodore Labrecque and Walter Conklin presiding at the Court House, Newark, New Jersey, on Thursday, January 16th, 1947 at 11:00 A. M.

Appearances

Charles B. Niebling, Esq., for the Petitioner.
Harry Pine, Esq., for the Respondent.

Commissioner Labrecque: You may proceed, gentlemen.

STATEMENT ON BEHALF OF PETITIONER

Mr. Niebling: The petition of appeal of the New Jersey Realty Title Insurance Company seeks cancellation of a personal property assessment of \$75,700.00 made by the City of Newark for the year 1945 on the ground that Chapter 4 Title 54 of the Revised Statutes is unconstitutional in so far as it purports to impose a tax based upon an assessment of not less than 15 percent of the sum of paid up capital and surplus in excess of the total of the company's liabilities.

In that such provision of the taxing statute in effect levies a tax upon non-taxable and exempt securities owned by the petitioner and results in unequal and discriminatory taxation.

The constitutionality of this statute has not been before the courts. I recognize that the Division of Tax Appeals may not undertake to rule upon the constitutionality of an [fol. 17] act of the legislature prior to a decision thereon by the courts under the principle that was cited in the case of Postal Telegraph and Cable Company against Martin, reported in 18 Miscellaneous 567, in which the State Board of Tax Appeals said that it would not pass upon constitutional questions of first impression in advance of their determination by the court.

However, I would like to make a statement for the record of the grounds upon which the petitioner challenges the constitutionality of the statute, and to put in proof of the

property owned by the petitioner made subject to taxation by the statute.

Commissioner Labrecque: All right, you may proceed.

Mr. Niebling: Mr. Anderson.

Hilmer Anderson, sworn as a witness in behalf of the petitioner, testified as follows:

Mr. Pine: Pardon me. It seems to me that inasmuch as it is recognized by the petitioner as well as the City of Newark that this board has no jurisdiction to test the constitutionality of a law passed by the State of New Jersey, I can see no reason at all for the entry of any evidence. It is a question of law, pure and simple. We don't disagree with their figures as rendered in their return. They are accurate and we have made our assessment based on their figures according to the law, not less than 15 per cent of paid in surplus and capital. The whole test is whether or not this [fol. 18] question is properly before this board. And since they themselves admit that you have no jurisdiction to decide it, why should the case be tried?

Commissioner Labrecque: Can't you gentlemen stipulate the factual situation leaving only the legal question involved to be determined?

Mr. Niebling: I would like to make a record both of the question and of the facts for the purpose of proceeding further before the Supreme Court.

Commissioner Labrecque: If you gentlemen are intending to proceed before the Supreme Court, wouldn't you save time and money by assuming that Mr. Pine's statement is correct and their figures are your figures; wouldn't you save time by stipulating those figures and putting them in a form of a written stipulation?

Mr. Pine: I think if they introduce the return that they made to the City of Newark that would be sufficient. I have no objection. I have got lots of time, but I don't see the necessity of it.

Commissioner Labrecque: We are ready to hear any evidence that you have to produce. You are not formally objecting on a legal basis?

Mr. Pine: No. I am merely suggesting that we can save time by the introduction of the same return.

Commissioner Labrecque: Apparently your opponent agrees with your return.

Mr. Niebling: Well, we disagree with the assessment even if made under the proviso of the statute for a minimum assessment in that the wrong figures, were used by the City. [fol. 19] So that I would like to put in that proof and also make a further statement of the grounds for the record.

Commissioner Labrecque: Well, you are the man that is going up, Mr. Niebling. You go ahead and make your own record. There is no formal objection before us.

Mr. Niebling: The statute under which the assessment which is before us was made is 54:4-22 of the Revised Statutes as amended by Chapter 245 of the laws of 1938.

This section sets forth the formula for the taxation of domestic stock insurance companies other than life insurance companies; providing for an assessment by a taxing district where its office is situated upon the full value of the company's intangible personal property exclusive of shares of stock and non-taxable property and property exempt from taxation, after deducting therefrom all debts and liabilities certain, the full reserves for taxes, and such proportion of reserves for unearned premiums, losses and other liabilities as the value of its taxable intangible property bears to the value of all of its intangible property.

The Statute adds the proviso that such assessment shall in no event be less than 15 per centum of the paid-up capital and surplus in excess of the total of all liabilities of the company, as the same are stated in the annual statement of such company for the calendar year next preceding the date of assessment and filed with the Department of Banking and Insurance of New Jersey, after deducting from such total [fol. 20] of capital and surplus the amount of all tax assessments against any and all real estate, title to which stands in the name of such company.

The contention of the petitioner is that the statute is unconstitutional, first, in that the application of the proviso for a minimum assessment operates to impose a direct tax upon bonds of the United States owned by the petitioner which are exempt from state and local taxation under the principle first enunciated by the United States Supreme Court in the case of McCullough against Maryland and in a long line of cases following that decision, and by force of the Act of Congress Title 31 United States Code Annotated in Section 742 providing that stocks, bonds, treasury notes and other obligations of the United States shall be exempt

from taxation by or under state or municipal or local authority.

And secondly, that the statute in subjecting the personal property of stock insurance companies to taxation by a special method of assessment makes an arbitrary classification resulting in unequal and discriminatory taxation in contravention of Article 4 Section 7 Paragraph 12 of the Constitution of New Jersey and the 14th Amendment to the Constitution of the United States.

Direct examination.

By Mr. Niebling:

Q. Mr. Anderson, what is your position with the New Jersey Realty Title Insurance Company?

A. I am Treasurer of the New Jersey Realty Title Insurance Company.

[fol. 21] Q. How long have you been in that capacity?

A. Since its organization June 1st, 1937.

Q. Was the company organized under the insurance laws of the State of New Jersey?

A. It was.

Q. Where is its principal office situated?

A. 830 Broad Street, Newark.

Q. Are you familiar with the assets and liabilities of the company as of October 1, 1944?

A. I am.

Q. And with the assets and liabilities shown in the report or annual statement filed with the Department of Banking and Insurance for the calendar year 1943?

A. Yes.

Q. Did you prepare the return filed with the City of Newark for the 1945 assessment under Section 22, Chapter 4, of Title 54?

A. I did.

Q. Is this a true copy of the return filed with the City?

A. It is.

Mr. Niebling: I would like to offer this and ask that it be marked in evidence.

Mr. Pine: No objection.

Commissioner Labreeque: It may be received and marked P-1.

(The return above referred to by Mr. Niebling was received in evidence and marked Exhibit P-1.)

Q. Is the balance sheet annexed to that return a correct statement of the assets and liabilities of the petitioner as of September 30th, 1944?

A. It is.

Q. What does the return show as to the total assets of the company?

A. Total assets of the company as shown on the return is \$774,972.98.

Q. What is shown as to real estate and tangible personal property?

A. Nothing.

[fol. 22] Q. And as to shares of stock owned by the company?

A. No shares owned by the company.

Q. What is the amount reported for exempt and non-taxable property?

A. \$770,454.20.

Q. And what does that consist of?

A. Bonds owned with accrued interest thereon, \$451,682.25.

Q. What bonds?

A. United States Government Bonds. Bonds and mortgages owned with accrued interest, \$129,175.32.

Commissioner Labreeque: Wouldn't your record be just as complete if your witness said "All the items in Schedule C Item 6 just offered?"

Mr. Niebling: Yes.

Commissioner Conklin: Let's shorten this.

Q. Included in the item for debts and liabilities certain being Item 8 of the return, are there all the items stated in Schedule D?

A. That is correct.

Q. And the Reserve for Federal Income Taxes, is that the figure stated in Item 9?

A. That is correct.

Q. And the proportion of loss and premium, is that the figure stated in Item 10?

A. That is correct.

Q. Now, turning to the annual statement for the calendar year 1943 filed with the Department of Banking and Insurance, what are the total assets of the petitioner shown in that statement?

A. \$758,973.90.

Q. And what is the total capital and surplus of the petitioner shown in that statement?

A. Capital \$250,000.00; paid in surplus, \$250,000.00; earned surplus, \$47,462.93.

Q. A total of \$547,462.93?

A. That is correct.

[fol. 23] Q. What are the total reserves shown in that statement?

A. Total reserves other than for federal income taxes, \$161,047.74.

Q. And of what items does that reserve consist?

Commissioner Labreeque: Do you have a statement of that too that can be offered?

Mr. Niebling: We have only a penciled copy, Commissioner. I have only a few questions to ask on this phase of it.

Commissioner Labreeque: All right.

A. \$161,047.74 includes reserve for unearned premiums, \$15,577.50; voluntary reserve \$100,701.41; statutory reserve \$22,695.23; accounts receivable \$22,073.60.

Q. What other liabilities are shown in that annual statement?

A. Liabilities for accounts payable which includes expenses necessary, bills, \$5,008.99; commissions \$6,339.84; income taxes, old age and unemployment, \$14,337.19; clients funds \$23,627.74; withholding tax payment, \$1,149.47, making the total liabilities \$50,463.23.

Q. Is there a minimum deposit required by the law against title losses for a title insurance company?

A. There is.

Q. How much?

A. \$50,000.00.

Q. What has been required by the Department of Banking and Insurance of the petitioner as a deposit?

A. \$100,000.00.

Q. What would the assessment be if computed on the basis of the total capital and surplus shown on the statement for 1943?

A. \$72,100.00.

Mr. Niebling: That is all, Commissioners.

Commissioner Labreeque: Any questions?

[fol. 24] Mr. Pine: I am interested in just three questions.

Commissioner Labreeque: All right.

Cross examination.

By Mr. Pine:

Q. Referring to your balance sheet as of October 1st, 1944 —rather September 30th, 1944; tell us what your capital stock, paid in surplus, profit and loss surplus is?

A. Capital stock \$250,000.00; paid in surplus \$250,000.00; profit and loss surplus, \$81,300.94; total of \$581,309.94.

Mr. Pine: That is all.

Mr. Niebling: Thank you for your indulgence.

Commissioner Labreeque: Any rebuttal?

Mr. Pine: No.

Commissioner Labreeque: All right.

Mr. Pine: Our contention is, Commissioner, that we are entitled to an assessment of a tax of 15 per cent—not less than 15 per cent on their paid in capital stock, surplus and so forth. In other words, the last three items we had answered. They contend it is unconstitutional. So we have nothing to rebut.

Commissioner Labreeque: Do either of you gentlemen feel that you would like to file a memorandum in this matter?

Mr. Niebling: I will be glad to file a memorandum if the Division wishes to consider it and pass upon the constitutionality.

Commissioner Labreeque: Well, that would be a very good subject for your memorandum; whether in your opinion we have the right.

Mr. Niebling: I think we both agree that you do not.

[fol. 25] Commissioner Labreeque: Then you both agree that you don't need to file a memorandum.

Mr. Niebling: May I add in response to what Mr. Pine has just said, that the petitioner's contention is that if the proviso of the statute is valid, the minimum should be based at 15 per cent of the total paid in capital and surplus as shown by the annual statement for the year 1943 and not by the condition of the company as of the assessing date.

Mr. Pine: Very little difference, isn't there, Mr. Niebling?

Mr. Niebling: About \$3,600.00.

(The hearing then closed.)

[fol. 26] IN NEW JERSEY SUPREME COURT, MAY TERM, 1948

No. 271

Argued May 5, 1948; decided July 23, 1948.

On Certiorari.

Before Justices BODINE AND HEHER.

For the prosecutor: Charles B. Niebling.

For the defendant City of Newark: Thomas L. Parsonnet; Vincent J. Casale, of counsel.

OPINION—Filed July 23, 1948.

The opinion of the court was delivered by Heher, J.

The question for decision is the validity of an assessment for taxation on intangible personal property of prosecutor, a stock insurance company, levied for the year 1945 by the City of Newark under R. S. 54:4-22, as amended by ch. 245 of the Pamphlet Laws of 1938.

The levy was in the sum of \$75,700., or 15% of the sum of the company's paid-up capital and surplus in excess of liabilities and certain reserves for taxes, unearned premiums, losses, and so on. The capital and surplus upon which the assessment was made included on the assessing date bonds issued by the United States in the total sum of \$451,682.25; and it is contended that section 54:4-22, cited *supra*, is "in contravention of the Constitution and laws of the United States," in that the proviso incorporated by the amendment of 1938, cited *supra*, fixing a minimum assessment at the rate of 15% of the paid-up capital and surplus in excess of liabilities, served to impose a direct tax upon the bonds issued by the Federal government included in the capital and surplus account.

Stocks, bonds, Treasury notes, and other obligations of the United States are "exempt from taxation by or under State or municipal or local authority." 31 U. S. C. A., Section 742; R.S. 54:4-3. *Vide Howard Savings Institution v. Newark*, 63 N. J. L. 547. The exemption does not now extend to interest upon obligations, or dividends, earnings, or other income upon shares, certificates, stock, or other evidences of ownership, or gain from the sale or other disposition of such obligations and evidences of ownership

issued on or after March 28th, 1942, by the United States or any agency or instrumentality thereof. Ch. 147 of the Public Laws of 1947; 61 Stat. 180; 31 U. S. C. A., section 742a.

The tax imposed by section 54:4-22, as amended, is not an excise, but an *ad valorem* tax on personal property. It is comprehended under this heading in the Revised Statutes. The tax is levied "upon the full amount or value" of the company's property (exclusive of real estate and tangible personal property, which are to be separately assessed and taxed where located, all shares of stock owned by the company, and nontaxable and exempt property), less "all debts and liabilities certain and definite as to obligation and amount," and all reserves for taxes and a fixed proportion of the reserves for "unearned premiums, losses and other liabilities;" *provided* the assessment against the "intangible personal property" shall "in no event be less than 15% of the sum of the paid-up capital and surplus in excess of the total of all liabilities of such company," as [fol. 28] stated in the company's annual statement for the preceding calendar year filed with the State Department of Banking and Insurance, after deduction "from such total of capital and surplus" of the amount of all tax assessments against real estate standing in the company's name.

Thus there is no specific provision here for the exclusion of stocks, bonds, and other obligations of the United States from the base paid-up capital and surplus in the calculation of the statutorily fixed minimum assessment on intangible personal property; but this provision and section 54: 4-3 are *in pari materia* and are therefore to be construed and effectuated as one enactment. So viewed, the legislative command is to exclude the Federal securities in reckoning the capital and surplus upon which the tax is assessable. It was not within the State legislative province to nullify the exemption from taxation of Federal obligations of this class arising from Federal law. If 15% minimum assessment imposes, as it does here, what is in fact a tax upon the exempt Federal securities, it is in contravention of Federal law and therefore invalid. It is not to be presumed that the Legislature intended to exceed its powers; quite the contrary. To tax the fund composed of exempt property is to tax such exempt property itself. *Newark City Bank v.*

Newark, 30 N. J. L. 13; *Fidelity Trust Co. v. Board of Equalization of Taxes*, 77 N. J. L. 128. A statute is to be construed as a whole with reference to the entire system of which it forms a part, and effectuated in accordance with what reasonably seems to be the legislative intention. Statutes constituting a system should be so construed as to make the system consistent in all its parts and uniform in [fol. 29] its operation. *Lewis' Sutherland Statutory Construction* (2 ed.) section 443. This interpretive principle was applied in the analogous case of *Federal Trust Co. v. Board of Equalization of Taxes, supra*. A construction should be adopted which, if reasonable, will uphold the enactment rather than one which will defeat it.

And, even though the legislative intention be otherwise, the particular invalid provision is severable and the remainder stands unimpaired; and so the sum of the Federal securities is deductible from the amount of capital and surplus in the ascertainment of the minimum tax. There is not that interdependence of provision which invalidates the whole. There is no hint of the indissoluble connection in legislative intent which would raise the inference that the legislative authority would not have enacted the one without the other. The excision of the invalid part of the statute under review, if such it be, will advance the essential legislative intent. The limitation thus imposed is a minor deviation which obviously is not of the essence of the statutory scheme and inseparable from it so that failure of the one provision in part would serve to nullify the whole enactment. The acceptance of the contrary view would frustrate the legislative will; and this is not of judicial function.

The judgment of the Division of Tax Appeals sustaining the assessment is reversed; and the cause is remanded for further proceedings not inconsistent with this opinion.

[fol. 30] IN NEW JERSEY SUPREME COURT

No. 271 MAY TERM, 1948

RULE REVERSING JUDGMENT

The Court having examined the record of the assessment made by the taxing district of the City of Newark for the year 1945 against the personal property of the prosecutor, New Jersey Realty Title Insurance Company, situated at 830 Broad Street, in said City of Newark, and the transcript of proceedings of the Division of Tax Appeals in the Department of Taxation and Finance on the appeal of prosecutor from said assessment, returned with the writ of certiorari in this cause, and the reasons for reversing the judgment below, and having heard the argument of counsel thereon and having duly considered the same, and having determined by the opinion of the Court filed herein on July 23, 1948 that the said judgment should be reversed and this cause remanded to the said Division of Tax Appeals for further proceedings not inconsistent with said opinion;

It is, on this 3rd day of August, 1948, ordered, that the said judgment of the Division of Tax Appeals be reversed, set aside and vacated, and that this cause be remanded to the Division of Tax Appeals to fix the amount of the personal property tax assessment for the year 1945 against prosecutor in accordance with said opinion.

Rule entered this 3rd day of August, 1948.

On Motion of Charles B. Niebling, Attorney for Prosecutor.

[fol. 31] IN NEW JERSEY COURT OF ERRORS AND APPEALS

NOTICE AND GROUNDS OF APPEAL

To: *Charles B. Niebling, Esquire,*
Attorney for Prosecutor-Appellee.

Please Take Notice that the Appellant, The City of Newark, a municipal corporation of the State of New Jersey, appeals to the New Jersey Court of Errors and Appeals, from the judgment entered in the New Jersey Supreme Court, for the reason that the latter court erred in giving judgment in favor of the Prosecutor-Appellee,

New Jersey Realty Title Insurance Company, instead of to the Defendants-Appellants, Division of Tax Appeals in the Department of Taxation and Finance of the State of New Jersey and the City of Newark.

Thomas L. Parsonnet, Attorney for and Of Counsel with Defendant-Appellant, the City of Newark.

Dated: August 19, 1948, Newark, N. J.

Service of copy of within Grounds of Appeal is hereby acknowledged this 19th day of August, 1948.

Charles B. Niebling, Attorney for Prosecutor-Appellee,

[fol. 32] IN SUPREME COURT OF NEW JERSEY, SEPTEMBER TERM, 1948

No. A 222

NEW JERSEY REALTY TITLE INSURANCE COMPANY, Prosecutor-Respondent

v.

DIVISION OF TAX APPEALS IN THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW JERSEY AND THE CITY OF NEWARK, a Municipal corporation, Defendants-Appellants.

Argued January 31, 1949; decided March 7, 1949.

On appeal from the former Supreme Court, whose opinion is reported in ~~137 N.J.L.~~ 444.

Mr. Vincent J. Casale, argued the cause for the appellant, the City of Newark; Mr. Thomas L. Parsonnet, on the brief.

Mr. Charles B. Niebling, argued the cause for the prosecutor-respondent.

A brief, *amicus curiae*, was filed by leave of the Court, by the Cities of Camden, Mr. John J. Crean and Mr. Norman Heine, attorneys, and Trenton, Mr. Louis Josephson, attorney.

OPINION—FILED MARCH 7, 1949

The opinion of the Court was delivered by

OLIPHANT, J.:

This appeal is from the former Supreme Court which on certiorari, reversed a judgment of the Division of Tax Appeals sustaining an assessment levied on the property of respondent pursuant to R. S. 54:4-22. The decision of the former Supreme Court was rested on the ground that the tax was not an excise tax, but an ad valorem tax on personal property, and that by taxing a fund composed of exempt property, in this case obligations of the United States which are exempt from state, municipal or local taxation under 31 U.S.C.A., Sec. 742 and R. S. 54:4-3, is to tax such exempt property. We are not in accord with this interpretation of [fol. 33] the statute.

The respondent is a stock insurance company subject to taxation under the cited statute, R. S. 54:4-22, supra.

The statute requires that the property of such companies, other than life insurance companies, shall be assessed and taxed in the taxing district where its office is situated, upon the full value of its property at the local rate and by the following formula.

There shall be excluded from the value of its property the following property: (a) Real estate and tangible property (which are taxed at the situs by general law); (b) all shares of stock owned by the company; (c) nontaxable property (which includes United States government securities which the state has no power to tax as such); (d) property exempt from taxation under the law of this state.

After excluding the above classes of property, there is deducted from the value of its property so found to be taxable the following items or debits (1) all debts and liabilities certain and definite; (2) the full amount of all reserves for taxes; (3) such proportion of the reserves for unearned premiums, losses, or other liabilities as the full amount of value of its taxable intangible property bears to the full amount and value of *all its intangible property*.

The arithmetical result produced by the application of the formula at this point is subject to the following controlling proviso which is integrated into the formula as a whole, that the assessment calculated under such formula shall in no

event be less than 15 percent of the paid up capital and surplus in excess of all liabilities of the insurance company as [fol. 34] the same are stated in the company's annual statement for the calendar year next preceding the assessing date and filed with the Department of Banking and Insurance, less the amount of the tax assessments against real estate owned by the company.

The total assets of the respondent as shown by its return were \$774,972.98 which included the following items which were excluded under the formula, exempt property \$461,682.25, mortgages on New Jersey real estate \$129,175.32; title plant \$47,500.00, cash on deposit \$136,594.74; other cash items and prepaid charges \$5,981.89, making a total of excludable property of \$770,454.20, which left a total of taxable intangibles of \$4,583.78. The deduction for debts and liabilities, certain tax reserves and proportionate loss of reserves was \$54,690.22 which left no balance of assessable property subject to tax at the local rate.

The respondent's capital stock and surplus on the assessing date as shown by its annual statement for the calendar year 1943 filed with the Department of Banking and Insurance totaled \$547,462.93. The assessment placed upon the net worth of the respondent by the city assessor of Newark was \$75,700.00.

The point made by the appellant city is that the tax imposed by R. S. 54:4-22 as amended by P. L. 1938, Chap. 245 is not an ad valorem tax against the property of the respondent, as was found by the Supreme Court.

It is well settled that a state has no power to assess against a corporation a tax which is essentially a property or income tax (whether it purports to be laid directly upon property or upon capital stock) as distinguished from franchise, privilege or excise taxes without allowing a deduction for sums invested in securities of the United States or from [fol. 35] income derived from such sources. 51 Amer. Juris., sec. 797 and the cases cited there.

But it is equally well settled that a state has the power to levy a tax on a legitimate subject, such as corporate franchises or property, measured by net assets or income, even though there is included, in the measure of the tax, tax-exempt federal instrumentalities or the income derived therefrom. A state tax so measured is not an infringement of the immunity from taxation. *Educational Films Corp.*

v. *Ward*, 282 U. S. 379, 75 L. Ed. 400, 51 Sup. Ct. 170; *Tradesmen's National Bank v. Oklahoma Tax Commission*, 300 U. S. 560, p. 564; 84 L. Ed. 947, p. 951, 60 Sup. Ct. 688.

We have concluded that the tax levied under this statute is not an ad valorem tax or property tax but rather is a valid tax upon the net worth of the company even though there be included in the calculation of the net worth certain exempt federal securities or their income.

The respondent contends that the case of *Missouri Ins. Co. v. Gehner*, 281 U. S. 313, 74 L. Ed. 870, 50 Sup. Ct. 326, is controlling. The Court in that case held that where the statute discloses a purpose as a general rule to omit from taxation sufficient assets of the insurance company to cover their legal reserve and unpaid policy claims and it is competent for the state to permit a less reduction or none at all, then where the ownership of United States bonds is made the basis of denying the full exemption which is accorded those who own no such bonds, this amounts to an infringement of guaranteed freedom from taxation. We do not think this case is controlling in the present situation.

[fol. 36] As we read R. S. 54:4-22 as amended, it does not tax the capital or surplus as such. The proviso in the statute simply fixes a floor below which the assessment under the formula is not permitted to go. In the operation of the formula an assessment in excess of 15 percent of the sum of paid-up capital and surplus is possible and when so found is taxable at the local rate. However when a minus sum is the result of the operation of the formula then the assessment is recalculated and the exclusions and deductions are accordingly reduced so as to produce an assessment against the intangible property which is not less in amount than 15 percent of the paid-up capital and surplus.

In the *Gehner* case, *supra*, it is true that similar exclusions and exemptions were established by state law and that the legislature reserved the right to alter or change these exemptions by law but in the formula set up in the Missouri statute the exemptions, exclusions and deductions were, for the purpose of arithmetical calculation, fixed factors which had the effect of throwing the weight of the tax onto the tax exempt federal securities to the point of discrimination. Compare *Schuylkill Trust Co. v. Pennsylvania*, 296 U. S. 112, p. 120, 80 L. Ed. 91, 56 Sup. Ct. 31.

Such is not the situation presented by R. S. 54:4-22. While it is true that the legislature authorizes that certain prop-

erty shall be excluded and exempted from the assessment and also permits certain other deductions and that our legislature, in the exercise of its reserve power, may alter or change any and all such items, they are not at the point of assessment fixed factors in the arithmetical taxing formula but are variable factors, because the legislature went one step further by the proviso which authorizes that these [fol. 37] various items shall be accordingly reduced with the ultimate purpose to produce an assessment of the net worth of all the intangible property of the insurance company which in the aggregate may not be less in amount than 15 percent of the paid-up capital and surplus as defined by the statute. The assessment may equal or exceed 15 percent of the paid-up capital and surplus, and does not necessarily have to be precisely the same, but it can not be less in amount than 15 percent of the paid-up capital and surplus.

The tax assessor under the law is required to apply the statute without any discrimination and in such a way that there is no infringement of the constitutional immunity. Compare *Macallen Co. v. Mass.*, 279 U. S. 620, 73 L. Ed. 874, 49 Sup. Ct. 432; *Miller v. Milwaukee*, 272 U. S. 713, 71 L. Ed. 487, 47 Sup. Ct. 280; *Educational Films Corp. v. Ward*, *supra*; *Pacific Co. v. Johnson*, 285 U. S. 480, 76 L. Ed. 893, 52 Sup. Ct. 424.

If the assessment is made without discrimination then it makes no difference whether the corporate property which is the result of the tax may chance to include federal exempt securities. The constitutional power of one government to reach a permissible object of taxation may not be curtailed because of the indirect effect which the tax may have upon such securities. *Educational Films Corp. v. Ward*, *supra*, at 389.

This seems to be the applicable rule whether the taxing statute is a franchise tax or a tax upon the net worth of the company, which latter we hold the tax under the statute before us to be. The statute is not designed to tax capital or surplus as such or any assets alleged to be included [fol. 38] therein. The proviso in question merely fixes, as stated, a floor below which the assessment on the intangible property representing net worth shall not be permitted to go. The statute being subject to the constitutional prohibition against discrimination with respect to federal securities contains a sufficient standard to meet the test set forth in

Gaines v. Hudson County Assessors, 37 N.J.L. 12 (Sup. Ct. 1873); *City of Hoboken v. Martin*, 123 N.J.L. 442 (E. & A., 1939).

The tax assessor is not granted an unlimited discretion. It is perfectly obvious that as a practical matter the legislature could not fix a detailed standard regulating the manner by which the exclusions, exemptions and deductions should be scaled down, which standard could operate with precision under all the possible variations that could be presented in the corporate organization, investment portfolios, properties owned and policy liabilities of the stock insurance companies subject to taxation under the act.

The judgment of the former Supreme Court is reversed and that of the Division of Tax Appeals affirmed.

[File endorsement omitted.]

v

[fol. 39] IN SUPREME COURT OF NEW JERSEY

Appeal Docket No. A222

Civil Action on Appeal

NEW JERSEY REALTY TITLE INSURANCE COMPANY, Prosecutor-
Respondent,

vs.

DIVISION OF TAX APPEALS IN THE DEPARTMENT OF TAXATION
and Finance of the State of New Jersey and the City of
Newark, a municipal corporation, Defendants-Appel-
lants.

MANDATE ON REVERSAL—Filed March 7, 1949

This cause having been duly argued before this Court by Vincent J. Casale, counsel for the appellant, City of Newark, and Charles B. Niebling, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said former Supreme Court is in all things reversed, set aside and for nothing holden, with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and

that the record and proceedings be remitted to the said Superior Court to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

Witness the Honorable Arthur T. Vanderbilt, Chief Justice, at Trenton on the 7th day of March, 1949.

Charles K. Barton, Clerk of the Supreme Court.

[fol. 40] IN SUPREME COURT OF NEW JERSEY

[Title omitted]

DOCKET ENTRIES

Grounds of Appeal, August 23, 1948.
Return, August 24, 1948.
Proof of Service, December 1, 1948.
Proof of Service, December 7, 1948.
Motion Check List, December 13, 1948.
Proof of Service, January 20, 1949.
Proof of Service, January 27, 1949.
Opinion of Reversal by Oliphant, J., March 7, 1949.
Mandate, March 7, 1949.
Record Remitted to Superior Court, March 25, 1949.
Order Allowing Appeal, June 6, 1949.
Affidavit, June 6, 1949.
Petition, June 6, 1949.
Citation, June 6, 1949.
Statement as to Jurisdiction, June 6, 1949.
Statement, June 6, 1949.
Proof of Service, June 8, 1949.
Bond, June 14, 1949.
Praeclipe, June 14, 1949.

[fol. 41] SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL FROM THE SUPREME COURT OF THE STATE
OF NEW JERSEY TO THE SUPREME COURT OF THE UNITED
STATES, ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSALTo the Honorable Harold H. Burton, Associate Justice of
the Supreme Court of the United States:Comes now New Jersey Realty Title Insurance Company,
a corporation, appellant in the above-entitled cause, by its
attorneys and respectfully shows:

1. On or about December 13, 1945, petitioner filed a petition of appeal to the Division of Tax Appeals, in the Department of Taxation and Finance of the State of New Jersey, from an assessment of \$75,700.00 levied by the City of Newark for the purpose of taxation on personal property, including United States Treasury Bonds, owned by petitioner, situate in the said city, County of Essex, State of New Jersey, for the year 1945.

[fol. 42] 2. By judgment dated April 22, 1947, the said Division of Tax Appeals dismissed the said appeal.

3. On Writ of Certiorari to the New Jersey Supreme Court (established under the constitution and laws of New Jersey then in force), the said court on August 3, 1948 entered a judgment reversing the judgment of the Division of Tax Appeals and ordering that the cause be remanded to the Division of Tax Appeals to fix the amount of the personal property tax assessment for the year 1945 in accordance with the court's written opinion.

4. An appeal from said judgment of the former New Jersey Supreme Court was taken to the Supreme Court of New Jersey (established under the constitution and laws of New Jersey now in force).

5. On said appeal the Supreme Court of New Jersey, which is the highest court of said state, reversed the judgment of the former Supreme Court and affirmed the judgment of the Division of Tax Appeals. The judgment of the Supreme Court of New Jersey was entered March 7, 1949.

6. In all of the foregoing proceedings there was drawn in question by petitioner the validity of the statute of the

State of New Jersey pursuant to which the aforementioned assessment was levied, namely, Title 54, Chapter 4, Section 22 of the Revised Statutes of New Jersey, as amended in 1938 (R.S. Cum. Supp. 54:4-22), which said statute, as so amended, is sometimes referred to as R.S. 54:4-22, on the ground of its being repugnant to the Constitution of [fol. 43] the United States and to Section 3701 of the Revised Statutes of the United States (31 U.S.C.A. § 742), in so far as applied to authorize the assessment upon the United States Treasury Bonds held by petitioner. The decision and judgment of the Supreme Court of New Jersey are in favor of the validity of the said state statute as so applied, and, greatly to petitioner's damage, are against the rights and exemptions claimed by petitioner under the Constitution and said law of the United States and under decisions of the Supreme Court of the United States construing the same.

As will appear further from the Assignment of Errors next hereinafter set forth, petitioner contends that the said statute of New Jersey as so applied and upheld, and the assessment thereunder, violate Article I, Section 8, clause 2, and the supremacy clause of Article VI, paragraph 2, and the due process clause of Amendment XIV, Section 1, of the Constitution of the United States, in that they impair and contravene the power of Congress to borrow money on the credit of the United States, infringe the constitutional command that the Constitution and the laws of the United States made in pursuance thereof shall be the supreme law of the land, and deprive petitioner of property without due process of law; and violate Section 3701 of the Revised Statutes of the United States (31 U.S.C.A. § 742) and the said supremacy clause, in that they tax bonds of the United States.

[fol. 44]

ASSIGNMENT OF ERRORS

Said New Jersey Realty Title Insurance Company, appellant in the above-entitled cause, assigns the following errors in the record and proceedings of said case:

1. The Supreme Court of New Jersey erred in holding and deciding that Title 54, Chapter 4, Section 22 of the Revised Statutes of New Jersey, as amended in 1938. (R.S.

Cum. Supp. 54:4-22)—which said statute as so amended was referred to in said court's opinion as R.S. 54:4-22—did not violate Article I, Section 8, Clause 2 of the Constitution of the United States in so far as said statute was applied to authorize the tax assessment by the City of Newark for the year 1945 on property of appellant without excluding the United States Treasury Bonds held by appellant from the property so assessed.

2. The Supreme Court of New Jersey erred in holding and deciding that the said statute of New Jersey did not violate the supremacy clause contained in the second paragraph of Article VI of the Constitution of the United States in so far as said statute was applied to authorize the said tax assessment on appellant's property without excluding said United States bonds from the property so assessed.

3. The Supreme Court of New Jersey erred in holding and deciding that the said statute of New Jersey did not violate Section 3701 of the Revised Statutes of the United States (31 U.S.C.A. § 742) in so far as said state statute was applied to authorize the said tax assessment on [fol. 45] appellant's property without excluding said United States bonds from the property so assessed.

4. The Supreme Court of New Jersey erred in failing to hold and decide that, by virtue of Article I, Section 8, Clause 2, and the supremacy clause of Article VI of the Constitution of the United States, the said United States bonds could not validly be included as part of appellant's paid-up capital or surplus in computing the assessment under the proviso clause of the said statute of New Jersey.

5. The Supreme Court of New Jersey erred in failing to hold and decide that Section 3701 of the Revised Statutes of the United States (31 U.S.C.A. § 742), in conjunction with the supremacy clause of Article VI of the Constitution of the United States, prohibited the said United States bonds from being included as part of said capital or surplus of appellant in computing said assessment.

6. The Supreme Court of New Jersey erred in holding and deciding that the tax assessed under the authority of the said statute was not an ad valorem or property tax within the scope of the decisions of the Supreme Court of the United States holding that United States bonds are

exempt from such tax by or under state, municipal or local authority.

7. The Supreme Court of New Jersey erred in failing to hold and decide that the said statute of New Jersey, in [fol. 46] so far as applied to authorize the City of Newark to levy said assessment on said United States bonds, violated Section 1 of the Fourteenth Amendment of the Constitution of the United States by depriving petitioner of its property without due process of law.

8. The Supreme Court of New Jersey erred in reversing the judgment of the former New Jersey Supreme Court.

PRAYER FOR REVERSAL.

Wherefore, petitioner, by its attorneys, prays for the allowance of an appeal from said Supreme Court of New Jersey, the highest court of said state, to the Supreme Court of the United States, in order that the decision and judgment of said Supreme Court of New Jersey, dated March 7, 1949, be reversed and that a judgment be rendered in favor of petitioner herein, and for costs.

Dated: May 31, 1949.

Walter Gordon Merritt, Charles B. Niebling, H. Gardner Ingraham, Attorneys for Appellant.

[fol. 47] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed June 6, 1949

The appellant in the above-entitled suit, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in this cause by the Supreme Court of the State of New Jersey on the 7th day of March, 1949, and having presented its Petition for Appeal, Assignment of Errors, Prayer for Reversal and Statement as to Jurisdiction, pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided:

It is now here ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United

States from the Supreme Court of the State of New Jersey in the above-entitled cause, as provided by law, and it is further

Ordered that the Clerk of the Supreme Court of the State [fol. 48] of New Jersey shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States so that he shall have the same in said Court within 40 days of this date, and it is further

Ordered that security for costs on appeal be fixed in the sum of \$250.00.

Dated: June 2nd, 1949.

(s.) Harold H. Burton, Associate Justice of the Supreme Court of the United States.

[File endorsement omitted.]

[fol. 49-52] Citation in usual form, filed June 6, 1949, omitted in printing.

[fol. 53] **SUPREME COURT OF THE UNITED STATES**

[Title omitted.]

PRAECLPICE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Supreme Court of the State of New Jersey:

New Jersey Realty Title Insurance Company, appellant in the above-entitled cause, by its attorneys, hereby requests you to make and transmit to the Supreme Court of the United States in compliance with Rule 10, paragraph 2 of the Rules of said court, a transcript of record for use on the appeal which has been allowed to said court from the Supreme Court of the State of New Jersey; and, pursuant to said Rule, hereby indicates and requests that the following portions of the record be incorporated into the said transcript:

1. Each and every portion of the record printed in the [fol. 54] "Appendix to Appellants' Brief" in the Supreme Court of New Jersey, which appendix constituted and was used as the printed record on appeal in the Supreme Court of New Jersey in the cause therein entitled "New Jersey

entity Title Insurance Company, Prosecutor-Respondent, & Division of Tax Appeals in the Department of Taxation and Finance of the State of New Jersey and the City of Newark, a municipal corporation, Defendants-Appellants." Appeal Docket No. A222, September Term, 1948.

2. Opinion of Supreme Court of New Jersey, filed March 1949.

3. Mandate on Reversal (judgment) of Supreme Court of New Jersey, filed March 7, 1949.

4. The docket entries of the Supreme Court of New Jersey.

5. Petition for Appeal from the Supreme Court of New Jersey to the Supreme Court of the United States, Assignment of Errors and Prayer for Reversal.

6. Statement As To Jurisdiction.

7. Order Allowing Appeal to the Supreme Court of the United States.

8. Citation.

9. Affidavit of Charles B. Niebling.

10. Statement Under Rule 12, Paragraph 2(b) of the Rules of the Supreme Court of the United States.

docs. 55-56] 11. Proof of Service of foregoing items 5 through 10, inclusive.

12. Cost on Appeal Bond.

13. This Praeclipe, with Acknowledgments of Service hereof.

Dated: June 10, 1949.

Walter Gordon Merritt, Charles B. Niebling, H. Gardner Ingraham, Attorneys for Appellant, % McLanahan, Merritt & Ingraham, 40 Wall Street, New York 5, N. Y.

ACKNOWLEDGMENTS OF SERVICE.

Receipt of a copy of the foregoing praecipe by the below-named appellee is acknowledged this 14th day of June 1949.

Division of Tax Appeals in the Department of Taxation and Finance of the State of New Jersey, by:
 /s/ Chas. E. Cook, Secretary; /s/ by Helen Heher.

Receipt of a copy of the foregoing praecipe by the undersigned is acknowledged this 14th day of June 1949.

/s/ Charles Handler, Counsel for the appellee, City of Newark, a municipal corporation.

[fol. 57] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 58] SUPREME COURT OF THE UNITED STATES.

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed July 7, 1949.

1. Comes now the Appellant in the above-entitled cause and for its statement of the points on which it intends to rely in its appeal to this Court adopts the points contained in its Assignment of Errors heretofore filed herein.

2. Appellant herein designates all portions of the record as being necessary for the consideration of the points herein relied upon, except the Affidavit of Charles B. Niebling and the Cost on Appeal Bond.

Dated: June 27, 1949.

New Jersey Realty Title Insurance Company, Appellant, by its Attorneys, Walter Gordon Merritt, Charles B. Niebling, H. Gardner Ingraham.

[fol. 59] ACKNOWLEDGMENTS OF SERVICE

Service of the foregoing Statement of Points to Be Relied Upon and Designation of the Parts of the Record to Be Printed is hereby acknowledged this 29th day of June, 1949.

Division of Tax Appeals in the Department of Taxation and Finance of the State of New Jersey, by Charles E. Cook, Secretary.

Service of the foregoing Statement of Points to be Relied upon and Designation of the Parts of the Record to be printed is hereby acknowledged this 6th day of July, 1949.

Charles Handler, Attorney for the Appellee City of Newark, a municipal corporation.

fol. 60] [File endorsement omitted.]

fol. 61] SUPREME COURT OF THE UNITED STATES.

ORDER NOTING PROBABLE JURISDICTION—October 10, 1949.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

fol. 62] Endorsed on Cover: File No. 53,896, New Jersey, Supreme Court, Term No. 147. New Jersey Realty Title Insurance Company, Appellant, *vs.* Division of Tax Appeals in the Department of Taxation and Finance of the State of New Jersey and the City of Newark. Filed June 28, 1949, Term No. 147 O. T. 1949.

(4761)

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 147

147

NEW JERSEY REALTY TITLE INSURANCE
COMPANY,

Appellant,

vs.

DIVISION OF TAX APPEALS IN THE DEPARTMENT
OF TAXATION AND FINANCE OF THE STATE OF
NEW JERSEY AND THE CITY OF NEWARK.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

STATEMENT AS TO JURISDICTION

WALTER GORDON MERRITT,
CHARLES B. NIEBLING,
H. GARDNER INGRAHAM,

Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 147

NEW JERSEY REALTY TITLE INSURANCE
COMPANY,

Appellant,

vs.

DIVISION OF TAX APPEALS IN THE DEPARTMENT
OF TAXATION AND FINANCE OF THE STATE OF
NEW JERSEY, AND THE CITY OF NEWARK, A MUNICI-
PAL CORPORATION,

Appellee

APPEAL FROM THE SUPREME COURT OF NEW JERSEY

STATEMENT AS TO JURISDICTION

Pursuant to Rule 12 of the Rules of the Supreme Court of the United States, as amended, the above named appellant presents this, its statement particularly disclosing the basis upon which appellant contends that the Court has jurisdiction upon appeal to review the judgment appealed from herein:

I. Nature of case: The case involves the power of a state to tax bonds of the United States. The precise question

presented, as is shown more fully hereinafter, is the constitutionality, under the provisions of the Constitution of the United States quoted below* and under Section 3701 of the Revised Statutes of the United States (31 U. S. C. A. § 742),** of the proviso clause of a property tax statute of New Jersey pursuant to which the City of Newark, an appellee herein, levied a personal property tax assessment for the year 1945 of 15% of the sum of the paid-up capital and surplus, less liabilities, of appellant, without excluding from the sum so assessed, United States Treasury Bonds held by appellant, and without any apportionment or deduction on account of said bonds.

The Supreme Court of New Jersey upheld the clause and statute as so applied to the United States Treasury Bonds. Its opinion is hereto appended (App. "A", pp. 13-18). The appellant claims that the clause and statute as so applied violate the aforesaid provisions of the Federal Constitution, as well as R. S. § 3701.

II. Statutory Provision Sustaining the Jurisdiction: The statutory provision which sustains the jurisdiction of this Court to review on appeal the judgment appealed from herein is Title 28, United States Code, section 1257(2).

III. State Statute, the Validity of Which Is Involved: The state statute, the validity of which as applied to the United States Treasury Bonds held by appellant, is involved, is Section 54:4-22 of the Revised Statutes of New Jersey, 1937 (Vol. II, Title 54, p. 27), as amended by Chap-

* "The Congress shall have power . . . To borrow Money on the credit of the United States" (Art. I, Sec. 8, cl. 2). "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme law of the Land" (Art. VI, par. 2).

" . . . nor shall any State deprive any person of . . . property without due process of law" (Amendment XIV, Sec. 1).

** "Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority."

ter 245 of the Pamphlet Laws of 1938. The statute, as so amended, constitutes Title 54, Chapter 4, Section 22 of the Revised Statutes Cumulative Supplement of New Jersey containing the Laws of 1938, 1939, 1940 (R. S. Cum. Supp. 54:4-22), and is found at pages 550-551 of said Supplement.

The statute appears in the Revised Statutes of New Jersey as part of "Subtitle 2. Taxation of Real and Personal Property in General" of Title 54, and provides:

"54:4-22. Taxation of stock insurance companies.
Every stock insurance company organized under the laws of this state, other than a life insurance company, shall be assessed and taxed in the taxing district where its office is situated, upon the full amount or value of its property (exclusive of real estate and tangible personal property, which shall be separately assessed and taxed where the same is located, and exclusive of all shares of stock owned by such insurance company and exclusive of nontaxable property and of property exempt from taxation), deducting from such amount or value all debts and liabilities certain and definite as to obligation and amount, and the full amount of all reserves for taxes, and such proportion of the reserves for unearned premiums, losses and other liabilities as the full amount or value of its taxable intangible property bears to the full amount or value of all its intangible property; provided, however, the assessment against the intangible personal property of any stock insurance company subject to the provisions of this section shall in no event be less than fifteen per centum of the sum of the paid-up capital and the surplus in excess of the total of all liabilities of such company, as the same are stated in the annual statement of such company for the calendar year next preceding the date of such assessment and filed with the department of banking and insurance of the state of New Jersey, after deducting from such total of capital and surplus the amount of all tax assessments against any and all real estate, title to which stands in the name of such company.

The capital stock in any such company shall not be regarded for the purposes of this act [section] as a liability and no part of the amount thereof shall be deducted, and the person or persons or corporations holding the capital stock of such company shall not be assessed or taxed therefor. No franchise tax shall be imposed upon any insurance company included in this section."

The assessment involved in this case was levied under the proviso clause, and the substantial federal questions of constitutionality which are presented on this appeal arise therefrom, as shown hereinafter.

IV. Dates of Judgment and Application for Appeal. The judgment of the Supreme Court of New Jersey which is sought to be reviewed herein was entered March 7, 1949.

The petition for allowance of an appeal to this Court is presented to the Honorable Harold H. Burton, Associate Justice of this Court, on June 2, 1949.

V. Summary of Facts and Rulings: Appellant's personal property return for the year 1945 under the New Jersey statute herein involved showed, among other items, total assets of \$774,972.98 comprised in part of United States Treasury Bonds of the par value of \$450,000 and of \$1,682.25 accrued interest thereon. It showed further that, after excluding said bonds and interest and other property exempt under the formula contained in the first portion of the statute, and after deducting debts, liabilities and reserves authorized to be deducted under that formula, a minus figure resulted and hence there could be no assessment under that formula.

Applying the proviso clause of the statute, however, the City of Newark levied an assessment of \$75,700 on appellant's personal property for the year 1945. That amount represented approximately, and was intended to represent

precisely, 15% of the paid-up capital and surplus, less liabilities, of appellant without any exclusion of, or any apportionment or deduction on account of, the United States Treasury Bonds held by appellant. The tax based on the assessment has been paid by appellant, but appellant will be entitled to refund if ultimately successful in this cause.

Appellant appealed the assessment to the Essex County Board of Taxation on the ground that the statute, as so applied, was unconstitutional. The Board decided that the appeal should be made to another tribunal in order that the constitutional question might be determined. Appellant thereupon appealed the assessment to the Division of Tax Appeals in the State Department of Taxation and Finance, an appellee herein. On April 22, 1947, after hearing before two Commissioners, the Division rendered judgment dismissing the appeal. The Commissioners' report which was filed on the same date as the judgment, states:

"This is a personal property appeal wherein the petitioner attacks the constitutionality of the assessment. This is not a proper court for the determination of such a question, and therefore, it is recommended that the appeal be dismissed."

No other opinion was rendered by or on behalf of the Division.

On August 3, 1948, on writ of certiorari, the then established New Jersey Supreme Court (which has been succeeded by the Superior Court) reversed the judgment of the Division of Tax Appeals and remanded the cause to the Division to fix the amount of the assessment in accordance with the Court's opinion. A copy of the opinion is hereto appended (App. "B", pp. 19-22). The court held in it that the tax imposed by the statute was an *ad valorem* tax on personal property and not an excise tax, and that

the United States Treasury Bonds held by appellant were to be excluded in computing capital and surplus assessable under the proviso clause, since otherwise the clause (or statute) would contravene Federal law.

On appeal by the City of Newark to the New Jersey Court of Errors and Appeals, the successor of that court, namely, the present Supreme Court of New Jersey, reversed the judgment of the former New Jersey Supreme Court and upheld the statute as applied. The court's opinion (App. "A", pp. 13-18) includes the following sentences which summarize the holding.

"We have concluded that the tax levied under this statute is not an ad valorem tax or property tax but rather is a valid tax upon the net worth of the company even though there be included in the calculation of the net worth certain exempt federal securities or their income" (App. "A", p. 16).

• • • The constitutional power of one government to reach a permissible object of taxation may not be curtailed because of the indirect effect which the tax may have upon such securities. *Educational Films Corp. v. Ward*, *supra* [28 U. S. 379, at 389] (id., pp. 17-18).

"This seems to be the applicable rule whether the taxing statute is a franchise tax or a tax upon the net worth of the company, which latter we hold the tax under the statute before us to be" (App. "A", p. 18).

The conclusions stated in the first and third sentences of the foregoing quotation are contrary to those held by this Court, as is shown below.

VI. The Federal Question Involved Is Substantial: In sustaining the validity of the proviso clause of the statute as applied to the United States bonds held by appellant, the Supreme Court of New Jersey decided an important Federal question in a way which conflicts with (A) applicable

decisions of this Court holding comparable tax statutes, when applied to United States bonds or securities, unconstitutional under the borrowing and supremacy clauses of the Federal Constitution (quoted *supra*, p. 2); and (B) the explicit prohibition enacted by Congress in R. S. § 3701 (quoted *supra*, p. 2), which prohibition is binding on the states under the supremacy clause.

(A) The decision of the Supreme Court of New Jersey is in direct conflict with this Court's decisions in the following cases applying the doctrine of *Weston v. City Council of Charleston*, 2 Pet. 449, and *McCulloch v. Maryland*, 4 Wheat. 316, to state or municipal taxes or assessments under state statutes analogous to that herein involved. *Farmers Bank v. Minnesota*, 232 U. S. 516 (1914) (state property tax on bank's surplus of assets, other than real estate, in excess of deposits and other accounts payable, where computation of assets included bonds of municipalities in federal territories); *Bank of Commerce v. New York City*, 2 Black 620 (1862) (assessment on actual value of bank's capital stock without excluding bank's investment in United States stocks, bonds and securities); *Bank Tax case*, 2 Wall. 200 (1864) (assessment on valuation measured by surplus, earnings and capital stock paid in or secured to be paid in, without excluding capital invested in United States stock); *The Banks v. The Mayor* (1868) (id., except involving inclusion of certificates of indebtedness and notes of the United States); *Home Savings Bank v. Des Moines*, 205 U. S. 503 (1907) (assessment on shares of stock valued to reflect assets including United States bonds).

In each of these cases this Court held that the aforesaid clauses of the Constitution prohibited the state, or city acting under state authority, from taxing the United States obligations involved through the device of taxing corporate worth, assets or capital, or a valuation based thereon, with-

out excluding the value of such obligations. See also *Missouri Ins. Co. v. Gehner*, 281 U. S. 313, which goes further than appellant's contentions herein.

The tax in *Farmers Bank v. Minnesota, supra*, was substantially identical with that presented herein. The unanimous opinion of the Court states (232 U. S. at 528):

"It is, however, further suggested that the judgment under review does not sustain a tax upon the bonds as property, but only a tax upon the surplus of the Savings Bank, computed by taking into the account all of its assets, amounting to about \$12,000,000, of which the bonds were only about \$700,000, and deducting therefrom its liabilities. But as the surplus is treated as property and taxed as such, it is obvious that some portion of the burden of the tax is attributable to the ownership of the municipal bonds. In *Bank of Commerce v. New York City*, 2 Black, 620, it was held that the State of New York in taxing the capital of banks according to its valuation must leave out of the calculation that portion of the capital invested in the stocks, bonds, or other securities of the United States not liable to taxation by the State. And see *Bank Tax Case*, 2 Wall. 200; *Home Savings Bank v. Des Moines*, 205 U. S. 503, 509.

"It results that the inclusion of the bonds now in question in the list of the assets of plaintiff in error, in ascertaining its surplus for the purpose of imposing a state property tax thereon, was repugnant to the Constitution of the United States."

The analysis and decision in the *Farmers Bank* and earlier cases above cited, while not followed or mentioned by the Supreme Court of New Jersey, have never been overruled or to any extent modified by this Court. The Department of Justice's study entitled "Taxation of Government Bondholders and Employees", published in 1938, correctly states (pp. 24-25):

"The Court has many times considered the validity of taxes imposed upon the 'capital' or the 'assets' of

corporations. In each of the cases it has held the tax invalid, unless provisions were made for deducting the value of government bonds held by the corporation."

That the tax herein involved is a property tax, as in the *Farmers Bank* and earlier cases, is clear from the express terms, as well as the context and local administration, of the New Jersey statute (*supra*, pp. 3-4). The proviso clause of the statute itself refers to "the assessment *against the intangible personal property*"; the judgment of the Division of Tax Appeals likewise referred to "the assessment levied for the year 1945 on the above described property." (Italics supplied.) Also, the opinion of the former New Jersey Supreme Court stated that the tax is "not an excise, but an *ad valorem* tax on personal property" (App. "B", p. 20).

The fact that the present Supreme Court of New Jersey in its opinion, characterized the tax as "not an *ad valorem* or property tax," does not, of course, preclude this Court from determining, or in any way limit this Court in determining, the true character of the tax for purposes of deciding the Federal question. *United States v. Allegheny County*, 322 U. S. 174, 184; *Schuylkill Trust Co. v. Penna.* 296 U. S. 113, 119; *Lawrence v. State Tax Commission*, 286 U. S. 276, 280 and cases there cited; *Home Savings Bank v. Des Moines*, *supra*. The rule is that "the descriptive pigeonhole into which a state court puts a tax is of no moment in determining the constitutional significance of the exaction." *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, at 443.

(B) If, as is claimed and has been shown, the assessment herein was levied partly upon the United States bonds owned by appellant, then R. S. § 3701 (31 U. S. C. A. § 742) and the supremacy clause of the Constitution clearly were violated. *Home Savings Bank v. Des Moines*, *supra*.

This would be true whether or not the borrowing clause of the Constitution is held to have been violated.

The Court recently has referred to "the long established Congressional intent to prevent taxes which diminish in the slightest degree the market value or the investment attractiveness of obligations issued by the United States in an effort to secure necessary credit." *Smith v. Davis*, 323 U. S. 111, at 117. The judgment of the Supreme Court of New Jersey, if allowed to stand, would subvert that intent of Congress.

VII. Manner in Which Federal Question was Raised: The federal question was raised at the outset and urged throughout the proceedings in New Jersey. Indeed, it was and is the whole basis of the case.

Appellant's "Petition of Appeal" to the Division of Tax Appeals, which commenced the proceeding therein, contested the assessment on the ground that the New Jersey statute "is unconstitutional" in that the proviso clause "in effect levies a tax upon non-taxable and exempt securities owned by petitioner" The bases of this contention, including reliance upon R. S. §3701 (31 U. S. C. A. §742), were made clear by counsel for appellant early in the hearing before the Division. He there stated:

"The contention of the petitioner is that the statute is unconstitutional, first, in that the application of the proviso for a minimum assessment operates to impose a direct tax upon bonds of the United States owned by the petitioner which are exempt from state and local taxation under the principle first enunciated by the United States Supreme Court in the case of *McCulloch* against Maryland and in a long line of cases following that decision, and by force of the Act of Congress Title 31 United States Code Annotated in Section 742 providing that stocks, bonds, treasury notes and other obligations of the United States shall be

exempt from taxation by or under state or municipal or local authority." *

An additional ground of unconstitutionality asserted by counsel, but not now urged, was that the statute embodied an arbitrary classification resulting in discriminatory taxation contravening the Federal Fourteenth Amendment and the State Constitution.

As already shown (*supra*, pp. 5-6), the Division did not undertake to rule upon the constitutional questions, since New Jersey law precluded it from so doing; but both the former New Jersey Supreme Court and the present Supreme Court of New Jersey did decide the questions now sought to be reviewed. The opinions of those courts show that the federal point based on R. S. §3701 and the supremacy clause, as well as that based on this Court's decisions under the borrowing clause of the Constitution, was presented to and determined by each, respectively (See especially App. "A", pp. 13, 15, 17-18; App. "B", pp. 19-20, 21).

Although the opinion of the Supreme Court of New Jersey states (App. "A", p. 16) that the New Jersey Realty Title Insurance Company contended that the case of *Missouri Ins. Co. v. Gehner*, 281 U. S. 313, was controlling, that case was not cited in the Company's brief. The Company's brief (pp. 9, 11) in that court did invoke, among other cases, *McCulloch v. Maryland*, *supra*, p. 7, *Bank of Commerce v. New York*, *id*; and *Home Savings Bank v. Des Moines*, *id.*, which, however, were not referred to in the court's opinion.

VIII. Cases Sustaining the Jurisdiction: The cases which are believed to sustain the jurisdiction are, among others, *Farmers Bank v. Minnesota*, 232 U. S. 516; *Missouri Ins. Co. v. Gehner*, 281 U. S. 313; each of the other cases hereinbefore cited on page 7; *Northwestern Ins. Co. v. Wisconsin*,

* This statement is quoted from the transcript of the hearing and appears on p. 20a of the "Appendix to Appellants' Brief" in the Supreme Court of New Jersey, which constituted the printed record therein.

275 U. S. 136; *Nat'l Life Ins. Co. v. United States*, 277 U. S. 508, *United States v. Allegheny County*, 322 U. S. 174. Cf. *Zucht v. King*, 260 U. S. 174.

Conclusion

It is, therefore, respectfully submitted that this Court has jurisdiction of this appeal under Title 28, United States Code, section 1257(2).

Dated: May 31, 1949.

WALTER GORDON MERRITT,
CHARLES B. NIEBLING,
H. GARDNER INGRAHAM,

Attorneys for Appellants.

APPENDIX "A"**SUPREME COURT OF NEW JERSEY, SEPTEMBER TERM, 1948****No. A 222****NEW JERSEY REALTY TITLE INSURANCE COMPANY, *Prosecutor-Respondent.*****vs.****DIVISION OF TAX APPEALS IN THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW JERSEY and the CITY OF NEWARK, a Municipal Corporation, *Defendants-Appellants*****Argued January 31, 1949. Decided March 7, 1949****On Appeal from the former Supreme Court, whose Opinion Is Reported in 137 N. J. L. 444**

Mr. Vincent J. Casale, argued the cause for the appellant, the City of Newark; Mr. Thomas L. Parsonnet, on the brief.

Mr. Charles B. Niebling, argued the cause for the prosecutor-respondent.

A brief, *amicus curiae*, was filed by leave of the Court, by the Cities of Camden, Mr. John J. Crean and Mr. Norman Heine, attorneys, and Trenton, Mr. Louis Josephson, Attorney.

The opinion of the Court was delivered by OLIPHANT, J.:

This appeal is from the former Supreme Court which on certiorari, reversed a judgment of the Division of Tax Appeals sustaining an assessment levied on the property of respondent pursuant to R. S. 54:4-22. The decision of the former Supreme Court was rested on the ground that the tax was not an excise tax, but an *ad valorem* tax on personal property, and that by taxing a fund composed of exempt property, in this case obligations of the United States which are exempt from state, municipal or local taxation under 31 U. S. C. A., Sec. 742 and R. S. 54:4-3, is to tax such

exempt property. We are not in accord with this interpretation of the statute.

The respondent is a stock insurance company subject to taxation under the cited statute, R. S. 54:4-22, supra.

The statute requires that the property of such companies, other than life insurance companies, shall be assessed and taxed in the taxing district where its office is situated, upon the full value of its property at the local rate and by the following formula.

There shall be excluded from the value of its property the following property: (a) Real estate and tangible property (which are taxed at the situs by general law); (b) all shares of stock owned by the company; (c) non-taxable property (which includes United States government securities which the state has no power to tax as such); (d) property exempt from taxation under the law of this state.

After excluding the above classes of property, there is deducted from the value of its property so found to be taxable the following items or debits (1) all debts and liabilities certain and definite; (2) the full amount of all reserves for taxes; (3) such proportion of the reserves for unearned premiums, losses, or other liabilities as the full amount of value of its taxable intangible property bears to the full amount and value of *all its intangible property*.

The arithmetical result produced by the application of the formula at this point is subject to the following controlling proviso which is integrated into the formula as a whole, that the assessment calculated under such formula shall in no event be less than 15 percent of the paid up capital and surplus in excess of all liabilities of the insurance company as the same are stated in the company's annual statement for the calendar year next preceding the assessing date and filed with the Department of Banking and Insurance, less the amount of the tax assessments against real estate owned by the company.

The total assets of the respondent as shown by its return were \$774,972.98 which included the following items which were excluded under the formula, exempt property \$461,682.25, mortgages on New Jersey real estate \$129,175.32;

title plant \$47,500.00, cash on deposit \$136,594.74; other cash items and prepaid charges \$5,981.89, making a total of excludable property of \$770,454.20, which left a total of taxable intangibles of \$4,583.78. The deduction for debts and liabilities, certain tax reserves and proportionate loss of reserves was \$54,690.22 which left no balance of assessable property subject to tax at the local rate.

The respondent's capital stock and surplus on the assessing date as shown by its annual statement for the calendar year 1943 filed with the Department of Banking and Insurance totaled \$547,462.93. The assessment placed upon the net worth of the respondent by the city assessor of Newark was \$75,700.00.

The point made by the appellant city is that the tax imposed by R. S. 54:4-22 as amended by P. L. 1938, Chap. 245 is not an ad valorem tax against the property of the respondent, as was found by the Supreme Court.

It is well settled that a state has no power to assess against a corporation a tax which is essentially a property or income tax (whether it purports to be laid directly upon property or upon capital stock) as distinguished from franchise, privilege or excise taxes without allowing a deduction for sums invested in securities of the United States or from income derived from such sources. 51 Amer. Juris., sec. 797 and the cases cited there.

But it is equally well settled that a state has the power to levy a tax on a legitimate subject, such as corporate franchises or property, measured by net assets or income, even though there is included, in the measure of the tax, tax-exempt federal instrumentalities or the income derived therefrom. A state tax so measured is not an infringement of the immunity from taxation. *Educational Films Corp. v. Ward*, 282 U. S. 379, 75 L. Ed. 400, 51 Sup. Ct. 170; *Tradesmen's National Bank v. Oklahoma Tax Commission*, 309 U. S. 560, p. 564; 84 L. Ed. 947, p. 951, 60 Sup. Ct. 688.

We have concluded that the tax levied under this statute is not an ad valorem tax or property tax but rather is a valid tax upon the net worth of the company even though there be included in the calculation of the net worth certain exempt federal securities or their income.

The respondent contends that the case of *Missouri Ins. Co. v. Gehner*, 281 U. S. 313, 74 L. Ed. 870, 50 Sup. Ct. 326, is controlling. The Court in that case held that where the statute discloses a purpose as a general rule to omit from taxation sufficient assets of the insurance company to cover their legal reserve and unpaid policy claims and it is competent for the state to permit a less reduction or none at all, then where the ownership of United States bonds is made the basis of denying the full exemption which is accorded those who own no such bonds, this amounts to an infringement of guaranteed freedom from taxation. We do not think this case is controlling in the present situation.

As we read R. S. 54:4-22 as amended, it does not tax the capital or surplus as such. The proviso in the statute simply fixes a floor below which the assessment under the formula is not permitted to go. In the operation of the formula an assessment in excess of 15 percent of the sum of paid-up capital and surplus is possible and when so found is taxable at the local rate. However when a minus sum is the result of the operation of the formula then the assessment is recalculated and the exclusions and deductions are accordingly reduced so as to produce an assessment against the intangible property which is not less in amount than 15 percent of the paid-up capital and surplus.

In the *Gehner* case, *supra*, it is true that similar exclusions and exemptions were established by state law and that the legislature reserved the right to alter or change these exemptions by law but in the formula set up in the Missouri statute the exemptions, exclusions and deductions were, for the purpose of arithmetical calculation, fixed

factors which had the effect of throwing the weight of the tax onto the tax exempt federal securities to the point of discrimination. Compare *Schuylkill Trust Co. v. Pennsylvania*, 296 U. S. 112, p. 120, 80 L. Ed. 91, 56 Sup. Ct. 31.

Such is not the situation presented by R. S. 54:4-22. While it is true that the legislature authorizes that certain property shall be excluded and exempted from the assessment and also permits certain other deductions and that our legislature, in the exercise of its reserve power, may alter or change any and all such items, they are not at the point of assessment fixed factors in the arithmetical taxing formula but are variable factors, because the legislature went one step further by the proviso which authorizes that these various items shall be accordingly reduced with the ultimate purpose to produce an assessment of the net worth of all the intangible property of the insurance company which in the aggregate may not be less in amount than 15 percent of the paid-up capital and surplus as defined by the statute. The assessment may equal or exceed 15 percent of the paid-up capital and surplus, and does not necessarily have to be precisely the same, but it can not be less in amount than 15 percent of the paid-up capital and surplus.

The tax assessor under the law is required to apply the statute without any discrimination and in such a way that there is no infringement of the constitutional immunity. Compare *Macallen Co. v. Mass.*, 279 U. S. 620, 73 L. Ed. 874, 49 Sup. Ct. 432; *Miller v. Milwaukee*, 272 U. S. 713, 71 L. Ed. 487, 47 Sup. Ct. 280; *Educational Films Corp. v. Ward*, *supra*; *Pacific Co. v. Johnson*, 285 U. S. 480, 76 L. Ed. 893, 52 Sup. Ct. 424.

If the assessment is made without discrimination then it makes no difference whether the corporate property which is the result of the tax may chance to include federal exempt securities. The constitutional power of one government to

reach a permissible object of taxation may not be curtailed because of the indirect effect which the tax may have upon such securities. *Educational Films Corp. v. Ward*, *supra*, at 389.

This seems to be the applicable rule whether the taxing statute is a franchise tax or a tax upon the net worth of the company, which latter we hold the tax under the statute before us to be. The statute is not designed to tax capital or surplus as such or any assets alleged to be included therein. The proviso in question merely fixes, as stated, a floor below which the assessment on the intangible property representing net worth shall not be permitted to go. The statute being subject to the constitutional prohibition against discrimination with respect to federal securities contains a sufficient standard to meet the test set forth in *Gaines v. Hudson County Assessors*, 37 N. J. L. 12 (Sup. Ct. 1873); *City of Hoboken v. Martin*, 123 N. J. L. 442 (E. & A. 1939).

The tax assessor is not granted an unlimited discretion. It is perfectly obvious that as a practical matter the legislature could not fix a detailed standard regulating the manner by which the exclusions, exemptions and deductions should be scaled down, which standard could operate with precision under all the possible variations that could be presented in the corporate organization, investment portfolios, properties owned and policy liabilities of the stock insurance companies subject to taxation under the act.

The judgment of the former Supreme Court is reversed and that of the Division of Tax Appeals affirmed.

APPENDIX "B"

(Filed July 23, 1948)

NEW JERSEY SUPREME COURT, MAY TERM, 1948

No. 271

Argued May 5, 1948; Decided July 23, 1948

On Certiorari

Before Justices Bodine and Heher

For the prosecutor: Charles B. Niebling.

For the defendant City of Newark: Thomas L. Parsonnet; Vincent J. Casale, of counsel.

The Opinion of the Court was Delivered by HEHER, J.:

The question for decision is the validity of an assessment for taxation on intangible personal property of prosecutor, a stock insurance company, levied for the year 1945 by the City of Newark under R.S. 54:4-22, as amended by ch. 245 of the Pamphlet Laws of 1938.

The levy was in the sum of \$75,700., or 15% of the sum of the company's paid-up capital and surplus in excess of liabilities and certain reserves for taxes, unearned premiums, losses, and so on. The capital and surplus upon which the assessment was made included on the assessing date bonds issued by the United States in the total sum of \$451,682.25; and it is contended that section 54:4-22, cited *supra*, is "in contravention of the Constitution and laws of the United States," in that the proviso incorporated by the amendment of 1938, cited *supra*, fixing a minimum assessment at the rate of 15% of the paid-up capital and surplus in excess of liabilities, served to impose a direct tax upon the bonds issued by the Federal government included in the capital and surplus account.

Stocks, bonds, Treasury notes, and other obligations of the United States are "exempt from taxation by or under State or municipal or local authority." 31 U. S. C. A.

Section 742; R. S. 54:4-3. Vide *Howard Savings Institution v. Newark*, 63 N.J.L. 547. The exemption does not now extend to interest upon obligations, or dividends, earnings, or other income upon shares, certificates, stock, or other evidences of ownership, or gain from the sale or other disposition of such obligations and evidences of ownership issued on or after March 28th, 1942, by the United States or any agency or instrumentality thereof. Ch. 147 of the Public Laws of 1947; 61 Stat. 180; 31 U.S.C.A., section 742a.

The tax imposed by section 54:4-22, as amended, is not an excise, but an *ad valorem* tax on personal property. It is comprehended under this heading in the Revised Statutes. The tax is levied "upon the full amount or value" of the company's property (exclusive of real estate and tangible personal property, which are to be separately assessed and taxed where located, all shares of stock owned by the company, and nontaxable and exempt property), less "all debts and liabilities certain and definite as to obligation and amount," and all reserves for taxes and a fixed proportion of the reserves for "unearned premiums, losses and other liabilities;" *provided* the assessment against the "intangible personal property" shall "in no event be less than 15% of the sum of the paid-up capital and surplus in excess of the total of all liabilities of such company," as stated in the company's annual statement for the preceding calendar year filed with the State Department of Banking and Insurance, after deduction "from such total of capital and surplus" of the amount of all tax assessments against real estate standing in the company's name.

Thus, there is no specific provision here for the exclusion of stocks, bonds, and other obligations of the United States from the base paid-up capital and surplus in the calculation of the statutorily fixed minimum assessment on intangible personal property; but this provision and section 54:4-3 are *in pari materia* and are therefore to be construed and effectuated as one enactment. So viewed, the legislative command is to exclude the Federal securities in reckoning the capital and surplns upon which the tax

is assessable. It was not within the State legislative province to nullify the exemption from taxation of Federal obligations of this class arising from Federal law. If 15% minimum assessment imposes, as it does here, what is in fact a tax upon the exempt Federal securities, it is in contravention of Federal law and therefore invalid. It is not to be presumed that the Legislature intended to exceed its powers; quite the contrary. To tax the fund composed of exempt property is to tax such exempt property itself. *Newark City Bank v. Newark*, 30 N.J.L. 13; *Fidelity Trust Co. v. Board of Equalization of Taxes*, 77 N.J.L. 128. A statute is to be construed as a whole with reference to the entire system of which it forms a part, and effectuated in accordance with what reasonably seems to be the legislative intention. Statutes constituting a system should be so construed as to make the system consistent in all its parts and uniform in its operation. *Lewis' Sutherland Statutory Construction* (2 ed.) section 443. This interpretive principle was applied in the analogous case of *Federal Trust Co. v. Board of Equalization of Taxes*, supra. A construction should be adopted which, if reasonable, will uphold the enactment rather than one which will defeat it.

And, even though the legislative intention be otherwise, the particular invalid provision is severable and the remainder stands unimpaired; and so the sum of the Federal securities is deductible from the amount of capital and surplus in the ascertainment of the minimum tax. There is not that interdependence of provision which invalidates the whole. There is no hint of the indissoluble connection in legislative intent which would raise the inference that the legislative authority would not have enacted the one without the other. The excision of the invalid part of the statute under review, if such it be, will advance the essential legislative intent. The limitation thus imposed is a minor deviation which obviously is not of the essence of the statutory scheme and inseparable from it so that failure of the one provision in part would serve to nullify the whole enactment. The acceptance of the contrary view would frustrate the legislative will; and this is not of the judicial function.

The judgment of the Division of Tax Appeals sustaining the assessment is reversed; and the cause is remanded for further proceedings not inconsistent with this opinion.

Filed Jun. 6, 1949. Charles K. Barton, Clerk.

A true copy.

Charles K. Barton, Clerk.

(3675)

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FOR
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Supreme Court of the United States

OCTOBER TERM, 1949

No. 147

NEW JERSEY REALTY TITLE INSURANCE COMPANY,
Appellant,

v.

DIVISION OF TAX APPEALS IN THE DEPARTMENT OF TAXATION
AND FINANCE OF THE STATE OF NEW JERSEY, and the CITY
OF NEWARK.

APPEAL FROM THE SUPREME COURT OF THE STATE OF
NEW JERSEY

BRIEF FOR APPELLANT

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Supreme Court of the United States

OCTOBER TERM, 1949

No. 147

NEW JERSEY REALTY TITLE INSURANCE COMPANY,

Appellant,

v.

DIVISION OF TAX APPEALS IN THE DEPARTMENT OF TAXATION
AND FINANCE OF THE STATE OF NEW JERSEY, and the CITY
OF NEWARK.

APPEAL FROM THE SUPREME COURT OF THE STATE OF
NEW JERSEY

BRIEF FOR APPELLANT

Opinions Below

The opinion of the Supreme Court of New Jersey (R. 23-28) is reported in 1 N. J. 496, 64 A. 2d 341. The opinion of the former New Jersey Supreme Court (R. 19-21) is reported in 137 N. J. L. 444, 60 A. 2d 265.

Jurisdiction

The judgment of the Supreme Court of New Jersey was entered March 7, 1949 (R. 28-29). The petition for allowance of an appeal to this Court was presented to, and the

order allowing appeal was signed by, Mr. Justice Burton, on June 2, 1949 (R. 30-34). On October 10, 1949, this Court noted probable jurisdiction and ordered the case transferred to the summary docket (R. 37). The statutory provision which sustains the jurisdiction of this Court to review upon appeal the judgment appealed from herein is Title 28, United States Code, Section 1257(2).

Questions Presented

1. Whether a tax statute of New Jersey providing, so appellant contends, for a property tax, as applied to authorize a minimum assessment against appellant's intangible personal property of not less than 15% of appellant's paid-up capital and surplus, violates the Borrowing Clause (Art. I, Sec. 8, Cl. 2) and the Supremacy Clause (Art. VI, Cl. 2) of the Constitution of the United States, in so far as such capital and surplus were computed without any exclusion or deduction of, or any apportionment on account of, United States Treasury Bonds and accrued interest thereon owned by appellant and comprising more than half its total assets.
2. Whether the New Jersey statute, as so applied, violates Section 3701 of the Revised Statutes of the United States and the Supremacy Clause (Art. VI, Cl. 2) of the Constitution of the United States by taxing obligations of the United States which Section 3701 exempts from taxation by or under state or municipal or local authority.
3. Whether, as a question involved in determining the above questions so far as they pertain to the accrued interest on appellants bonds, the Public Debt Act of 1941 as amended (55 Stat. 9, 56 Stat. 190, 61 Stat. 180; 31 U. S. C. A. § 742a), authorizes state or municipal taxation of the interest on appellant's United States Treasury Bonds issued after March 28, 1942.

New Jersey Statute, the Validity of Which is Involved

The state statute, the validity of which—the proviso clause in particular—as applied to the United States Treasury Bonds owned by appellant is challenged, is Section 54:4-22 of the Revised Statutes of New Jersey, 1937, as amended by Chapter 245 of the Pamphlet Laws of 1938. The statute, as so amended, is found at pages 550-551 of the Revised Statutes, Cumulative Supplement of New Jersey containing the Laws of 1938, 1939 and 1940.

Shown in its context, the statute provided:

"Title 54. TAXATION

Subtitle 2. TAXATION OF REAL AND PERSONAL PROPERTY IN GENERAL:

Chapter 4. ASSESSMENT AND COLLECTION OF TAXES.

Article 4. ASSESSMENT OF PERSONAL PROPERTY.

54:4-22. Taxation of stock insurance companies.

Every stock insurance company organized under the laws of this state, other than a life insurance company, shall be assessed and taxed in the taxing district where its office is situated, upon the full amount or value of its property (exclusive of real estate and tangible personal property, which shall be separately assessed and taxed where the same is located, and exclusive of all shares of stock owned by such insurance company and exclusive of nontaxable property and of property exempt from taxation), deducting from such amount or value all debts and liabilities certain and definite as to obligation and amount, and the full amount of all reserves for taxes, and such proportion of the reserves for unearned premiums, losses and other liabilities as the full amount or value of its taxable intangible property bears to the full amount or

value of all its intangible property; provided, however, the assessment against the intangible personal property of any stock insurance company subject to the provisions of this section shall in no event be less than fifteen per centum of the sum of the paid-up capital and the surplus in excess of the total of all liabilities of such company, as the same are stated in the annual statement of such company for the calendar year next preceding the date of such assessment and filed with the department of banking and insurance of the state of New Jersey, after deducting from such total of capital and surplus the amount of all tax assessments against any and all real estate, title to which stands in the name of such company.

The capital stock in any such company shall not be regarded for the purposes of this act [section] as a liability and no part of the amount thereof shall be deducted, and the person or persons or corporations holding the capital stock of such company shall not be assessed or taxed therefor. No franchise tax shall be imposed upon any insurance company included in this section."

Chapter 132, Section 10, of the Laws of 1945, which became effective on April 10, 1945 (subsequent to the levy of assessment herein), amended the foregoing statute by deleting the last sentence. The statute, so amended, is found at page 708 of the Revised Statutes Cumulative Supplement of New Jersey containing the Laws of 1945, 1946, 1947. See Appendix "A", *infra*, pages 39-40.

Pertinent Other Statutes of New Jersey

Section 54:4-1 of the Revised Statutes of New Jersey, as amended in 1942 and 1943, and as found at pages 462-463 of the Revised Statutes Cumulative Supplement of New Jersey containing the Laws of 1941, 1942 and 1943, provided:

* See next footnote.

"54:4-1. Property subject to tax; date of assessment. All property, real and personal within the jurisdiction of this state not expressly exempted from taxation or expressly excluded from the operation of this chapter shall be subject to taxation annually under this chapter at its true value, and shall be valued by the assessors of the respective taxing districts. Property omitted by the assessors may be assessed as hereinafter provided. All property shall be assessed to the owner thereof with reference to the amount owned on October first in each year, and the person so assessed for personal property shall be personally liable for the taxes thereon."

Section 54:4-3 of the Revised Statutes of New Jersey provided at the time of the assessment herein:*

"54:4-3. Exemption of U. S. securities. The bonds and other securities of the United States, other than circulating notes of national banking associations and the United States legal tender notes and other notes and certificates of the United States, payable on demand and circulating or intending to circulate as currency, and gold, silver or other coin shall be exempt from taxation under this chapter."

Pertinent other statutes of the State of New Jersey are set forth in the appendix, *infra*, pages 35-40.

* Chapter 163, §§ 1 and 2, respectively, of the Laws of 1945, effective April 13, 1945, amended Section 54:4-1, *supra*, and repealed Section 54:4-3; *supra*; but said chapter is inapplicable herein by virtue of § 9 thereof, which provided, in substance, that the chapter should not apply in instances of assessments levied prior to April 13, 1945. See *infra*, p. 35, and R. S. Cum. Supp. N. J., 1945, §§ 54:4-1, 54:4-1.1 and 54:4-3, pp. 705-706. The assessment date herein was October 1, 1944, *infra*, p. 7.

Federal Constitutional and Statutory Provisions Involved

Article I, Section 8, Clause 2 of the Constitution of the United States provides:

"The Congress shall have Power

To borrow Money on the credit of the United States;"

Article VI, Clause 2 of the Constitution of the United States provides:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Section 3701 of the Revised Statutes of the United States (U. S. C., Title 31, Sec. 742) provides:

"Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority."

Section 4 of Chapter 7 of the Public Debt Act of 1941, 55 Stat. 9, as amended (U. S. C. Title 31, Sec. 742a.) is set forth in Appendix "A", *infra*, page 40.

Statement

Appellant is, and during the tax year 1945 was, a stock insurance company organized under the laws of New Jersey, and having its office and owning property situate in the City and taxing district of Newark, County of Essex, New Jersey (R. 1, 4, 15).

Appellant filed its property tax return for 1945 under the statute herein challenged on the printed form furnished by the City of Newark entitled "PERSONAL PROPERTY RETURN OF STOCK INSURANCE COMPANY FOR YEAR 1945 UNDER SECTION 54:4-22 OF REVISED STATUTES" (R. 6-10). The balance sheet and schedules included in the return were as at September 30, 1944, which was the day prior to the assessing date for the 1945 assessment.* The items appearing from the return and herein pertinent, may be shown, in summary, as follows:

| | |
|--|--------------|
| Total assets | \$774,972.98 |
| Total intangible assets | \$774,972.98 |
| Property to be excluded under the formula contained in the first portion of the statute: | |
| United States Treasury Bonds purchased in 1941, 1942 and 1943 (book value) | \$450,000.00 |
| Accrued interest on above Bonds | \$ 1,682.25 |
| Various other exempt or non-taxable properties .. | \$318,771.95 |
| | <hr/> |
| Total taxable intangibles | \$ 4,518.78 |
| Deductions to be made under said formula: | |
| Debts and liabilities certain | \$ 25,756.63 |
| Reserves for taxes | \$ 28,175.46 |
| Proportion of reserves for losses | \$ 758.13 |
| | <hr/> |
| Assessment under said formula | NONE |

* N. J., R. S. 54:4-35 (Appendix "A", *infra*, p. 37) provides that the assessor shall begin the work of assessment on October 1 in each year and complete the work and file his complete assessment list by January 10 following. Under the practice, the assessment date is October 1 preceding the tax year.

Appellant's capital stock and surplus, as shown on the balance sheet, were: Capital Stock \$250,000; Paid in Surplus \$250,000; Profit and Loss Surplus \$81,300.94 (R. 7).

The accuracy of the foregoing and all other figures shown on appellant's return has been conceded (R. 13), and there is no issue as to assessment under the formula contained in the first portion of the statute. Appellant concededly was not assessed thereunder, but under the proviso clause (R. 13, 18).

The only item appearing on the return which related to the proviso clause was (R. 6):

"12. MINIMUM ASSESSMENT (15% of sum of Capital and Surplus after deducting Real Estate Assessments and other Tax Exempt and Non-Taxable Securities. Use last annual statement.)"

Appellant's response to this item was "None". The record does not show whether this response was based on appellant's views as to the unconstitutionality of the proviso clause, or whether on miscalculations or on any claimed deduction additional to deduction of appellant's United States Treasury Bonds and the accrued interest thereon. Appellant's annual statement filed with the State Department of Banking and Insurance for the calendar year 1943 showed paid-up capital \$250,000 (R. 17), paid-in surplus \$250,000 (id.), earned surplus \$47,462.93 (id.), total liabilities \$50,463.23 (id.) and United States Treasury Bonds aggregating, with accrued interest, \$452,526.06.*

If deduction or exclusion of the Bonds and interest were proper under the proviso clause, it appears now that, while

* This figure does not appear in the record, but has been furnished to counsel. The record does disclose, however, that of the \$450,000.00 Bonds owned by appellant on September 30, 1944, most had been purchased in 1941 and 1942, and the remainder on April 28, 1943 (R. 9).

some assessment could be levied under the clause, such assessment could not exceed \$14,240.53.*

The City of Newark, acting under the proviso clause, levied an assessment of \$75,700.00 against appellant's intangible personal property for the year 1945 (R. 2, 12). The computation by which this amount of assessment was arrived at does not appear in the record. But it is conceded in the record (R. 13, 18), and it was conceded by

* This maximum figure results as below shown if the words "in excess of the total of all liabilities" appearing in the proviso clause are construed as being redundant rather than as authorizing liabilities to be deducted from the sum of the paid-up capital and surplus before applying the 15%.

| | | |
|---|-------|---------------------------|
| Paid-up capital | | \$250,000.00 |
| Surplus | | |
| Paid-in surplus | | \$250,000.00 |
| Earned surplus | | \$ 47,462.93 \$297,462.93 |
| Sum of paid-up capital and surplus | | \$547,462.93 |
| (in other words, Net Worth) | | |
| Less: United States Treasury Bonds and accrued interest | | \$452,526.06 |
| | | \$ 94,936.87 |
| Less: Real estate assessments | | None |
| | | \$ 94,936.87 |
| Assessment—15% × \$94,936.87 = | | \$ 14,240.53 |

If literal effect were given the words "in excess of the total of all liabilities", the permissible assessment would be reduced to \$6,671.05, since the 15% would then be applied not to the net worth of \$94,936.87, but to that figure less the total actual liabilities of \$50,463.23. Such literal interpretation, while not foreclosed by any state court decision addressed to the point, would be inconsistent with the statement of the Supreme Court of New Jersey in its present opinion that the tax is upon net worth (R. 26, 27). It would conflict also with the administrative interpretation and practice.

counsel for the City of Newark in the court below,* that the City purported to base its assessment on the figures shown in appellant's return, and that in computing the sum of the paid-up capital and surplus the City did not deduct or exclude, but included the value of the Bonds and accrued interest owned by appellant.

Appellant paid the tax** which was levied by the City on the basis of the \$75,700 assessment, but appealed the assessment to the Essex County Board of Taxation on the ground that the statute, as so applied, was unconstitutional (R. 5). The Board decided that the appeal should be made to another tribunal in order that the constitutional question might be determined (R. 5). Appellant thereupon appealed the assessment to the Division of Tax Appeals in the State Department of Taxation and Finance, an appellee herein (R. 4-10). Appellant contended on this appeal that the statute as applied was unconstitutional in that the proviso clause operated to impose a direct tax upon bonds of the United States in violation of the principle established by this court in *McCulloch v. Maryland*, 4 Wheat. 316, and subsequent decisions, and in violation also of Section 3701 of the Revised Statutes of the United States (R. 12, 14-15). An additional ground of unconstitutionality asserted on that appeal, but not now urged, was that the statute embodied an arbitrary classification resulting in discriminatory taxation contravening the Fourteenth

* The Brief submitted in behalf of the City of Newark in the court below, stated (at p. 2):

"The appellant, the taxing district of the City of Newark, levied an assessment of \$75,700.00 upon the personality of the prosecutor for the year 1945—which is 15% of the paid-in capital and surplus—in accordance with the above statute."

** The record does not show the amount of the tax. Counsel is advised that the City of Newark tax rate for 1945 was \$5.16 per hundred dollars assessment and that \$3,906.12 was the amount of the tax paid by appellant.

Amendment of the Constitution of the United States, as well as the Constitution of New Jersey (R. 15).

On April 22, 1947, after hearing before two Commissioners, the Division rendered judgment dismissing the appeal (R. 11). The Commissioners' report stated (R. 10, fol. 14):

"This is a personal property appeal wherein the petitioner attacks the constitutionality of the assessment. This is not a proper court for the determination of such a question, and therefore it is recommended that the appeal be dismissed."

No other opinion was rendered by or on behalf of the Division.

On August 3, 1948, on writ of certiorari, the then established New Jersey Supreme Court reversed the judgment of the Division of Tax Appeals and remanded the cause to the Division to fix the amount of the assessment in accordance with the court's opinion (R. 22). The court held that the Bonds owned by appellant were to be deducted in computing capital and surplus assessable under the proviso clause, since the clause was *in pari materia* with section 54:4-3 (quoted, *supra*, p. 5) and since if it were not construed as requiring or permitting deduction for the Bonds it would contravene Federal law (R. 20-21). The opinion stated, *inter alia* (R. 20):

"The tax imposed by section 54:4-22, as amended, is not an excise, but an *ad valorem* tax on personal property" (fol. 27).

*** If 15% minimum assessment imposes, as it does here, what is in fact a tax upon the exempt Federal securities, it is in contravention of Federal law and therefore invalid. *** To tax the fund composed of exempt property is to tax such exempt property itself" (fol. 28).

Referring to the exemption enacted by Congress in R. S. § 3701 (31 U. S. C., § 742, quoted, *supra*, p. 6) and to the provisions of 31 U. S. C., § 742a (quoted, *infra*, p. 40), the opinion expressed the view that such exemption does not extend to interest upon United States obligations issued on or after March 28, 1942 (R. 19-20). The opinion did not mention whether the Constitution prohibits such interest from being taxed by or under the authority of a state. Nor did it or the judgment refer specifically to the accrued interest on appellant's Bonds.

On appeal by the City of Newark to the New Jersey Court of Errors and Appeals (R. 22-23), the successor of that court, namely, the present Supreme Court of New Jersey, reversed the judgment of the former New Jersey Supreme Court and upheld the statute as applied (R. 23-29). The court's opinion includes the following sentences which summarize its conclusions:

"We have concluded that the tax levied under this statute is not an ad valorem tax or property tax but rather is a valid tax upon the net worth of the company even though there be included in the calculation of the net worth certain exempt federal securities or their income" (R. 26, fol. 35).

• • • • •

"If the assessment is made without discrimination then it makes no difference whether the corporate property which is the result [sic] of the tax may chance to include federal exempt securities. The constitutional power of one government to reach a permissible object of taxation may not be curtailed because of the indirect effect which the tax may have upon such securities. *Educational Films Corp. v. Ward*, [282 U. S. 379] *supra*, at 389.

"This seems to be the applicable rule whether the taxing statute is a franchise tax or a tax upon the net worth of the company, which latter we hold the tax under the statute before us to be. * * * (R. 27, fol. 37).

The opinion nowhere called the tax an excise or a franchise or other indirect tax. It cited no authority for the proposition that the rule applicable to a tax upon franchise applies as well to a tax upon net worth.

Specification of Assigned Errors to Be Urged

1. The Supreme Court of New Jersey erred in holding and deciding that Title 54, Chapter 4, Section 22 of the Revised Statutes of New Jersey, as amended in 1938 (R. S. Cum. Supp. 54:4-22 * * *) did not violate Article I, Section 8, Clause 2 of the Constitution of the United States in so far as said statute was applied to authorize the tax assessment by the City of Newark for the year 1945 on property of appellant without excluding the United States Treasury Bonds held by appellant from the property so assessed.
2. The Supreme Court of New Jersey erred in holding and deciding that the said statute of New Jersey did not violate the Supremacy Clause contained in the second paragraph of Article VI of the Constitution of the United States in so far as said statute was applied to authorize the said tax assessment on appellant's property without excluding said United States bonds from the property so assessed.
3. The Supreme Court of New Jersey erred in holding and deciding that the said statute of New Jersey did not violate Section 3701 of the Revised Statutes of the United States (31 U. S. C. A. § 742) in so far as said state statute was applied to authorize the said tax assessment on appellant's property without excluding said United States bonds from the property so assessed.
4. The Supreme Court of New Jersey erred in failing to hold and decide that, by virtue of Article I, Section 8, Clause 2, and the Supremacy Clause of Article VI of the

Constitution of the United States, the said United States bonds could not validly be included as part of appellant's paid-up capital or surplus in computing the assessment under the proviso clause of the said statute of New Jersey.

5. The Supreme Court of New Jersey erred in failing to hold and decide that Section 3701 of the Revised Statutes of the United States (31 U. S. C. A. § 742), in conjunction with the Supremacy Clause of Article VI of the Constitution of the United States, prohibited the said United States bonds from being included as part of said capital or surplus of appellant in computing said assessment.

6. The Supreme Court of New Jersey erred in holding and deciding that the tax assessed under the authority of the said statute was not an ad valorem or property tax within the scope of the decisions of the Supreme Court of the United States holding that United States bonds are exempt from such tax by or under state, municipal or local authority.

8. The Supreme Court of New Jersey erred in reversing the judgment of the former New Jersey Supreme Court.

Summary of Argument

I

The decision below is in flat conflict with a number of decisions of this Court involving state statutes laying or authorizing a tax similar to the instant, upon corporate capital or surplus or upon a valuation measured by either or both. *Bank of Commerce v. New York City*, 2 Black 620 (1863), and later cases discussed, *infra*, pages 19-21. This Court has held uniformly in these cases that the Borrowing and Supremacy Clauses of the Constitution impliedly

forbid inclusion of the value of bonds and similar obligations of the United States owned by the corporation in computing the capital, surplus or valuation assessed. The tax in each instance was held to be an unconstitutional property tax upon the Government bonds or other obligations to the extent that their value was included in the calculation, whether or not the state courts regarded the tax as a property tax or as being imposed on the bonds or other obligations.

These decisions have not been reversed or modified. Nor has their continuing validity been questioned in any of the opinions of this Court in cases which have relaxed the doctrine of implied intergovernmental tax immunities with respect to various income, franchise, excise or other so-called indirect taxes.

The conclusion of the Supreme Court of New Jersey and the contention of appellees, that the present tax is not an *ad valorem* or property tax, is plainly untenable; and in deciding the Federal questions herein, this Court is not bound or limited by such conclusion below. (*United States v. Allegheny County*, 322 U. S. 174, 184, and other decisions cited, *infra*, p. 17.) The characterization of the tax as being "upon the net worth of the company" (R. 26, 27) is, in any event, the equivalent of stating that it is a tax upon the paid up capital and surplus. As such, it is indistinguishable from the taxes above referred to which have been held unconstitutional by this Court.

The tax has not been, and properly cannot be called a franchise tax, since it operates without regard to whether the corporation does business or exercises any other privilege. Cf. *Educational Films Corp. v. Ward*, 282 U. S. 379, 388. By its plain terms and context, as well as by the method of local assessment and administration, the statute provides for a property tax.

II

The New Jersey-statute, as applied, is unconstitutional under the Supremacy Clause for the additional or separate reason that it violates the express prohibition enacted by Congress in Section 3701 of the Revised Statutes of the United States. *Bank v. Supervisors*, 2 Wall. 26. See *Smith v. Davis*, 323 U. S. 111.

The legislative history of Section 3701 affords no ground for doubt that the statutory exemption was intended to be at least co-extensive with the constitutional exemption implied by this Court in the *Bank of Commerce* and other cases determined by this Court during the Civil War era. That broad scope must be given the statutory exemption is, if anything, reinforced by the fact that there has been no modification of the Section except the very limited one which was enacted in the Public Debt Act of 1941 permitting income from Government securities to be taxed by the Federal Government but not the States.

III

The statement contained in the opinion of the former New Jersey Supreme Court (R. 19-20) to the effect that the Public Debt Act of 1941, as amended, permits taxation of the interest on United States Bonds by States, or under State authority, is erroneous. The title of the Public Debt Act of 1941, and even more clearly the legislative history of the Act and the minor amendments since adopted, show that it authorizes only Federal taxation of such income. A holding to that effect is called for herein to insure proper disposition on remand.

Argument

I

The proviso of the New Jersey statute, as applied, infringes the Borrowing and Supremacy clauses of the Federal Constitution by taxing, without any consent of Congress, bonds issued by the United States

This Point is sustained by (A) a summary of decisions of this Court, which establish that a state or municipal property, as distinct from excise or privilege, tax upon corporate capital and/or surplus, or upon a valuation measured by either or both, violates the above clauses of the federal Constitution to the extent that bonds or similar obligations of the United States are included in the calculation of such capital and/or surplus; and (B) an analysis of the New Jersey statute and the assessment herein, which shows that, in operation and law, the tax imposed is a property tax within the scope of this Court's decisions.

The fact that the Supreme Court of New Jersey stated in its opinion that the tax "is not an *ad valorem* tax or property tax but rather is a valid tax upon the net worth" (R. 26), does not, quite apart from the obvious *non-sequitur*, preclude this Court from determining, or in any way limit this Court in determining, the true character of the tax for purposes of deciding the Federal questions. *United States v. Allegheny County*, 322 U. S. 174, 184; *Schuylkill Trust Co. v. Penna.*, 296 U. S. 113, 119; *Lawrence v. State Tax Commission*, 286 U. S. 276, 280. *Educational Films Corp. v. Ward*, 282 U. S. 379, 387; and decisions discussed *infra*, pages 18-21. The rule is that "the descriptive pigeon-hole into which a state court puts a tax is of no moment in determining the constitutional significance of the exaction." *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, at 443.

A. Summary of Pertinent Decisions

The basic constitutional principle involved in this case, is, of course, the principle expounded in *McCulloch v. Maryland*, 4 Wheat. 316 (1819) and *Osborn v. United States Bank*, 9 Wheat. 738 (1824), that the properties, functions and instrumentalities of the federal Government are immune from taxation by or under state authority, at least in the absence of consent of Congress. There is no such consent here, but the opposite, as shown in Point II.

The decision in *Weston v. City Council of Charleston*, 2 Pet. 499 (1829), established that the *McCulloch* principle applies to state or municipal taxation of bonds or similar obligations of the United States. The Court held that an ordinance, construed by the majority as imposing a property tax on a personal estate consisting of United States stock, violated the Borrowing Clause (*supra*, p. 6) and the Supremacy Clause (*id.*) of the Constitution of the United States. The Court's opinion, written by Chief Justice Marshall, declared (at 465) that, of the various operations of government:

"No one can be selected which is of more vital interest to the community than this of borrowing money on the credit of the United States. No power has been conferred by the American people on their government, the free and unburdened exercise of which more deeply affects every member of our republic."

and that (at 468):

"The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence, depends on the will of a distinct government. To any extent, however inconsiderable, it is a burden on the operations of government. It may be carried to an extent which shall arrest them entirely."

Although the ordinance in the *Weston* case subjected the United States obligations to taxation *eo nomine* and could have been regarded as discriminating against them, the opinion makes clear that the holding was not rested on those narrow grounds. Subsequent decisions have confirmed this interpretation and settled that the holding applies in cases similar to the instant. *Bank of Commerce v. New York City*, 2 Black 620 (1863); *Bank Tax Case*, 2 Wall. 200 (1864); *The Bank v. The Mayor*, 7 Wall. 16 (1868); *Farmers Bank v. Minnesota*, 232 U. S. 516 (1914).

The *Bank of Commerce* case involved a New York statute under which a municipal tax assessment was levied on the actual value of the bank's capital stock. The value of the bank's real estate was deducted in computing the value of the stock, but the bank's investment in United States stocks, bonds and securities was not deducted. The Tax Commissioners in making the assessment stated that it was "not an assessment upon such public debt, but upon bank capital" (2 Black at 621). Basing their decisions on an earlier decision* of the Court of Appeals of New York which had interpreted the *Weston* case as being inapplicable to a non-discriminatory tax not *eo nomine* upon obligations of the United States, the state courts had upheld the assessment in so far as it reflected the value of United States stocks, bonds and securities issued after, and not contracted for prior to, the Act of Congress of February 25, 1862, which provided for exemption (26 N. Y. 163, 164). This Court reversed. In a unanimous opinion, it held that the effect of the assessment upon capital was to tax the obligations of the United States con-

* *The People, ex rel. The Bank Of The Commonwealth v. The Commissioners of Taxes and Assessments*, 23 N. Y. 192, 205-209. The decision was reviewed and overruled by this Court contemporaneously with the decision in the *Bank of Commerce* case. 2 Black 635.

trary to the *McCulloch* and *Weston* decisions. The Court expressly recognized (at 629) that there was no feature of discrimination in the New York statute or assessment and that the *Weston* decision was not based on the presence of such a feature in that case.

As a result of the *Bank of Commerce* decision by this Court, New York amended its statute to tax banks, not on the actual value of their capital, but "on a valuation equal to the amount of capital stock paid in, or secured to be paid in, and their surplus earnings * * *." A tax based upon such a valuation computed without excluding capital invested in United States stock, was involved in the *Bank Tax Case, supra*. This Court unanimously reversed the Court of Appeals' decision that the statute did not tax the stock and was constitutional as applied. In so doing, the Court overruled the argument made to it on behalf of the City, that the tax was not a property tax, but was a franchise tax and that the valuation provided for in the statute was only to fix the amount of such franchise tax. (See 2 Wall. 200, at 201-202.)

The *Bank Tax Case* was unanimously followed in *The Bank v. The Mayor, supra*, which held that United States certificates of indebtedness were unconstitutionally included in computing valuation under the amended New York statute.

Another decision which would need to be overruled if the judgment below were to be affirmed is that in the *Farmers Bank* case, *supra*. Essentially identical with the tax herein, the tax there was on surplus of assets, other than real estate, in excess of deposits and other accounts payable. In computing the assets, bonds of municipalities in federal territory were included. As here, the state contended, and the state court held, that there was no tax upon the bonds as property. But this Court unanimously overruled such contention and reversed the judgment. The opinion stated (232 U. S. at 528):

"It is, however, further suggested that the judgment under review does not sustain a tax upon the bonds as property, but only a tax upon the surplus of the Savings Bank, computed by taking into account all of its assets, amounting to about \$12,000,000, of which the bonds were only about \$700,000, and deducting therefrom its liabilities. But as the surplus is treated as property and taxed as such, it is obvious that some portion of the burden of the tax is attributable to the ownership of the municipal bonds. * * *"

"It results that the inclusion of the bonds now in question in the list of assets of plaintiff in error, in ascertaining its surplus for the purpose of imposing a state property tax thereon, was repugnant to the Constitution of the United States."

Neither the *Farmer's Bank* decision, nor any of this Court's other decisions above described commencing with *Bank of Commerce*, has been overruled or modified. So far as counsel has discovered, they have never been questioned in any opinion or dissent in this Court. To the extent that any departure from them has been claimed to have occurred in this Court, such departure was an extension and occurred in *Missouri v. Gehner*, 281 U. S. 313. However, contrary to the apparent supposition of the Supreme Court of New Jersey (R. 26), appellant does not particularly rely upon that decision and does not need to do so.

The tax in *Missouri v. Gehner* was upon net value of the personal assets of insurance companies in excess of legally required reserves and any unpaid policy claims. Unlike the situation here, the United States bonds owned by the company had been deducted in computing its taxable assets (281 U. S. at 318-319, 321). The question before this Court arose from the fact that, in arriving at the final net value taxed, the state court had not allowed deduction of the full amount of the legal reserves and unpaid policy claims, but deduction only of a lesser amount

based on the proportion that the taxable assets bore to all the assets. This Court reversed on the ground that while the statute might validly have permitted no reduction at all on account of reserves or policy claims, it could not make ownership of Government bonds the basis of denying the full reduction to which owners of other personalty were entitled. The majority opinion concluded as follows (at 322):

"It is clear that the value of appellant's government bonds was not disregarded in making up the estimate of taxable net values. That is in violation of the established rule. *Nat'l Life Ins. Co. v. United States, supra* [277 U. S. 508]; *Northwestern Ins. Co. v. Wisconsin*, 275 U. S. 136; *Miller v. Milwaukee*, 272 U. S. 713."

The decision was applied in *Schuylkill Trust Co. v. Penna.*, 296 U. S. 113, 119. Indeed, it was there extended.

If it were assumed that the holding in *Missouri v. Gehner* would not be followed in a like situation to-day and that the dissenting opinion per Mr. Justice Stone would be preferred, appellant's case herein would not be weakened, since appellant's Bonds were not deducted in computing its capital and surplus under the proviso (*supra*, pp. 9-10). The dissenting opinion itself stated that, while tax-exempt securities may be part of net worth, "net worth thus computed should be held subject to the state tax *except insofar as tax exempt securities contribute to it*". (281 U. S. at 327). (Emphasis added.)

The Supreme Court of New Jersey relied on decisions of this Court, upholding non-discriminatory state franchise taxes measured by property or income including Government bonds or income therefrom. *Educational Films Corp. v. Ward*, 282 U. S. 379; *Tradesmen's Bank v. Tax Comm'n*, 309 U. S. 560. But these decisions have not undermined the *Bank of Commerce* line of decisions involving property taxes. This has been clear ever since

Society For Savings v. Coite, 6 Wall. 594. Franchise taxes are taxes upon the exercise of a privilege, rather than upon the right of ownership. As was stated in the Court's opinion written by Mr. Justice Stone in *Pacific Co. v. Johnson*, 285 U. S. 480, at 490:

“* * * It suffices to say that the tax immunity extended to property *qua* property does not embrace a special privilege, the corporate franchise, otherwise taxable, merely because the value of the corporate property or net income is included in an equitable measure of the enjoyment of the privilege. The owner may enjoy his exempt property free of tax, but if he asks and receives from the state the benefit of a taxable privilege as the implement of that enjoyment, he must bear the burden of the tax which the state exacts as its price.”

The same reasoning differentiates the *Bank of Commerce* line from decisions* involving transfer taxes, excise taxes, and various other so-called indirect taxes measured in part by exempt securities. *Plummer v. Coler*, 178 U. S. 115, 126-134. See *Hale v. State Board*, 302 U. S. 95, 109.

The distinction between a tax on corporate capital or surplus, and a tax on shares of stock as property of stockholders, also has long been settled. Decisions upholding the latter kind of tax derived originally from an Act of Congress, and such taxes, even though based on a valuation which reflected the value of exempt securities owned by the corporation, were held constitutional on the ground that the property in the shares, was distinct from the property of the corporation**. Where, however, a state

* Many of these decisions are collected in *Pacific Co. v. Johnson*, *supra*, and *Educational Films Corp. v. Ward*, *supra*.

** *Van Allen v. Assessors*, 3 Wall. 573; *Peoples National Bank v. Board of Equalization*, 260 U. S. 702; *Des Moines National Bank v. Fairweather*, 263 U. S. 103.

tax ostensibly laid upon shares of the stockholders of a bank was regarded by this Court as being actually laid upon the bank's capital, the *Bank of Commerce* decisions were applied and the state statute held unconstitutional as an infringement of the Borrowing power and as violating R.S. § 3701, insofar as the assessor, in computing the assessment, took into account the bank's capital, surplus and undivided earnings without deducting bonds of the United States owned by it. *Home Savings Bank v. Des Moines*, 205 U. S. 503.

If it be urged that a franchise, or excise, or other privilege tax, or a tax upon stockholders' shares, is as much "a clog upon the borrowing power"** as is a property tax, when both are measured by the value of Government securities, the answer has been given by this Court in the case chiefly relied on by the court below. *Educational Films Corp. v. Ward*, 282 U. S. 379, at 391 (per Mr. Justice Stone):

"It is said that there is no logical distinction between a tax laid on a proper object of taxation, measured by a subject matter which is immune, and a tax of like amount imposed directly on the latter; but it may be said with greater force that there is a logical and practical distinction between a tax laid directly upon all of any class of government instrumentalities, which the Constitution impliedly forbids, and a tax such as the present [franchise tax] which can in no case have any incidence, unless the taxpayer enjoys a privilege which is a proper object of taxation, and which would not be open to question if its amount were arrived at by any other non-discriminatory method."

The opinions in this Court's decisions which have relaxed former strict rules of implied immunities, in the

* The phrase is Mr. Justice Cardozo's, *Hale v. State Board*, 302 U. S. 95, at 107.

fields of governmental salaries, government work contractors, and interstate commerce, and of trust, leased or similar government lands, have not criticized or cast doubt upon the validity of the *Bank of Commerce* line of decisions. Nor has any statute similar to R. S. § 3701 been involved in those cases. Cf. *Helvering v. Gerhardt*, 304 U. S. 405; *Graves v. O'Keefe*, 306 U. S. 466; *O'Malley v. Woodrough*, 307 U. S. 277; *James v. Dravo Contracting Co.*, 302 U. S. 434; *Okla. Tax Comm'n v. Texas Co.*, 336 U. S. 342, 367, and cases cited at 359-360.

That the *Bank of Commerce* line of decisions stands intact was attested by the Department of Justice in an exhaustive study published in 1938 entitled "TAXATION OF GOVERNMENT BONDHOLDERS AND EMPLOYEES."¹¹ This Court's more recent decision in the Mesta Co. case (*United States v. Allegheny County*, 322 U. S. 174) impliedly attests the same. Although that case did not involve a tax upon capital or surplus, it is persuasive authority herein. The holding that the leased Government machinery was subjected to an unconstitutional property tax in that its value was included in the valuation of the private real estate taxed, is especially relevant because the state court had concluded that the tax was laid only on the real estate. See 322 U. S. at 180, 183-185.

* The Department's study was occasioned by President Roosevelt's message to Congress favoring legislation relaxing inter-governmental tax immunities. Although it questioned the soundness of a number of this Court's decisions involving other kinds of taxes, it did not question the *Bank of Commerce* line other than the extension in *Missouri v. Gehner, supra*. It stated (pp. 24-25):

"The Court has many times considered the validity of taxes imposed upon the 'capital' or the 'assets' of corporations. In each of the cases it has held the tax invalid unless provision were made for deducting the value of government bonds held by the corporation. Whatever the measure of taxation which is adopted, if the Court concludes that it is in effect imposed upon the property held by the corporation, the value of its government bonds must be deducted. ***"

**(B) The New Jersey Tax Involved Is a Property Tax
Within the Scope of This Court's Decisions**

The conclusion of the Supreme Court of New Jersey, and the contention of the appellees, that the New Jersey statute does not impose a property tax within the meaning of this Court's decisions, cannot be supported.

It overlooks the close similarity between the proviso clause of the New Jersey statute and the statutes involved in the *Bank of Commerce* line of cases. It does not explain how a tax said in the opinion below to be "upon the net worth of the company" (R. 26, 27) could be other than a property tax when such net worth is comprised of the paid-up capital and surplus and when the tax is not, and was not called in the opinion, a franchise, excise, privilege or any other named tax. And it erroneously fails to give effect to (1) the practical operation of the proviso; (2) its express terms; (3) its context, including the scheme of the New Jersey tax statutes read as a whole, as they should be (*Cf., Pacific Co. v. Johnson*, 285 U. S. 480, 495); and (4) its administration.

Decisions earlier cited (pp. 17, 19) have established that, in determining the true character of the tax for purpose of deciding the Federal questions, this Court is not bound or limited by the state court's characterization.

1. *Operation of the proviso:* The most important test of the true character of a tax statute is its practical operation. *Educational Films Corp. v. Ward*, 282 U. S. 379, 388; *Lawrence v. State Tax Comm.*, 286 U. S. 276, 280. Judged by that test, the tax here is a property tax. Cases *supra*, pp. 19-21, 23-24, 25. Unlike in *Educational Films Corp.*, the statute here has an "application independent of the corporation's enjoyment of the privilege of exercising its franchise" (282 U. S. at 388). Appellant would be liable for the tax whether or not it did business during the

year. The tax, when levied, is based not on income, but solely on a valuation of property.

The Cities of Camden and Trenton, *amici curiae* in the court below, contended that the proviso does not operate to tax the Bonds, but merely to limit exemptions and deductions otherwise allowable under the formula of the statute (Br., pp. 5-7). But the proviso, as applied, would authorize a tax in the case of a company whose capital and surplus was comprised solely of exempt Government bonds. Such tax, moreover, would be as high as in the case of a company having the same capital and surplus comprised solely of non-exempt intangibles.

2. *Terms of the Statute* (quoted *supra*, pp. 3-4): The formula portion specifies that any company subject to the statute shall be assessed and taxed "upon the full amount or value of its property". The proviso specifies that the assessment "against the intangible personal property" shall be not less than the described minimum. This phraseology is consistent only with a property tax. Also, the last sentence of the section, as it stood at the time of the assessment (*supra*, p. 4), specified that no franchise tax shall be imposed upon any company subject to the section. Neither the court below nor either appellee has asserted that the tax should be regarded as one upon franchise. Nor have they pointed to any particular term as indicating that the tax is not "against the intangible personal property" as the proviso states the assessment to be.

At the time of the assessment herein, the formula portion of the statute, read in conjunction with Section 54:4-3, expressly exempted bonds and other securities of the United States (*supra*, p. 5). If the legislature had not intended the statute to impose a property tax, one may wonder why it provided for this exemption.

3. *Context and Scheme of the Statute*: The title, subtitle, chapter and article headings under which the statute

appears are shown on page 3 of this brief. Each of them is consistent only with the view that the present tax is a property tax and was so intended. The same view is confirmed by reference to Section 54:4-1 (quoted, *supra*, p. 5) and Sections 54:4-2, 54:4-9, 54:4-18, 54:4-35 and 54:4-36 (App. "A", *infra*, pp. 36-37) with which also the present statute (Section 54:4-22) is to be read.

The provisions of Section 54:4-1 are very similar to those which this Court, in *Hale v. State Board*, 302 U. S. 95, at 102, called "a mandate clearly addressed to the levy of *ad valorem* taxes only." All ensuing sections in Chapter 4 of Title 54 are in harmony with 54:4-1. Conversely, New Jersey's non-property taxes, including franchise, premium receipts and various other business taxes, are provided for in later chapters and under different subtitles. See App. "A", *infra*, pages 38-40.

Although New Jersey had no franchise tax applicable to appellant at the time of the assessment herein, an equivalent tax was enacted in 1945 (P. L. 1945, c. 132; N. J. R. S. Cum. Supp. 54:18A-1, *infra*, p. 39). It is imposed annually upon taxable premiums, less various amounts including property taxes. Its existence, without any change in the statute here involved other than the deletion of the last sentence thereof (*supra*, p. 4), is still another feature of the statutory scheme of New Jersey inconsistent with any assimilation of the present tax as being other than a property tax. New Jersey should not be held to impose, in effect, two franchise taxes on appellant.

4. *Administration of the Statute:* Prior to the decision of the court below, the administrators of the statute appear to have regarded it as a property tax statute. The former New Jersey Supreme Court so regarded it in his opinion (R. 20-21). By its own terms, it is administered "in the taxing district where [the company's] office is situated", rather than centrally as in the cases of New Jersey's fran-

chise, premium receipts, and similar privilege taxes. N. J. R. S. Cum. Supp. 54:10A-1 *et seq.*, 54:18A-1 *et seq.*

The judgment of the Division of Tax Appeals herein referred to "the assessment levied for the year 1945 on the above described property" (R. 11). The form tax return furnished by the City of Newark was entitled "PERSONAL PROPERTY RETURN * * *" (R. 6), and Item 12 on its face called for deduction of "Tax Exempt and Non-Taxable Securities" in applying the proviso (*id.*).

II

The proviso of the New Jersey statute, as applied, violates Section 3701 of the Revised Statutes of the United States and, therefore, is unconstitutional under the Supremacy clause of the Constitution of the United States.

Section 3701 of the Revised Statutes of the United States (*supra*, p. 6) specifies that, except as otherwise provided by law, all bonds and other obligations of the United States "shall be exempt from taxation by or under State or municipal or local authority." Its validity under the Necessary and Proper clause of the Constitution has not been questioned by appellees and is clear. *Bank v. Supervisors*, 2 Wall. 26, 29, 30-31.

The opinion of the Supreme Court of New Jersey made passing reference to Section 3701 (R. 24), but did not discuss it or specify any reason for not applying it. The reason presumably lay in the court's conclusion that the tax was not a property tax. But such characterization of the tax was erroneous, as has been shown (pp. 26-29), and the infringement of Section 3701 is plain. *Bank v. Supervisors*, *supra*; *Home Savings Bank v. Des Moines*, 205 U. S. 503, 513-514. See also *Smith v. Davis*, 323 U. S. 111.

Section 3701 was derived from provisions contained in a series of earlier statutes commencing with the Act of

February 25, 1862, 12 Stat. 345, 346. These various statutes are collected in a footnote in *Smith v. Davis, supra*, at 117. Investigation of the legislative history of these statutes and of R. S. § 3701 has disclosed nothing to indicate that the exemption provision of any of them was intended to waive or curtail in any respect the constitutional immunities established by the decisions of this Court in the *Weston, Bank of Commerce*, and other cases hereinbefore discussed (pp. 18-20). The exemptions were enacted, apparently, in order to assure that those immunities would be preserved and would extend to legal tender notes issued during the Civil War era. Cf. *Bank v. Supervisors, supra*. The New York statute taxing the capital of banks without allowing deduction of United States securities in computing the value of such capital, and the decision of the Court of Appeals of New York in *The Bank of the Commonwealth* case, *supra*, p. 19, upholding such statute, may further explain why Congress enacted the exemption in 1862. Cf. *Bank of Commerce v. New York City*, 2 Black 620, argument at 625.

In the case of the exemption enacted in Section 1 of the Act of June 30, 1864, 13 Stat. 218, there was considerable debate in Congress.* See Cong. Globe, 38 Cong., 1st Sess., 1864, pp. 3183-3187, 3212, 3214-3218, 3289, 3311, 3326, 3351. At one stage the House sitting in Committee of the Whole adopted an amendment striking out the exemption (*id.*, 3186). An amendment thereupon was introduced affirmatively subjecting the securities of the United States to taxation by or under state authority (*id.*, 3186). Representatives strongly favoring such amendment argued *inter alia*, that the 1862 exemption was a mistake and favored the rich (*id.*). But the amendment was defeated by a narrow margin after Thaddeus Stevens, who was Chairman

* The exemption provided:

"And all bonds, Treasury notes, and other obligations of the United States shall be exempt from taxation by or under state or municipal authority."

of the House Ways and Means Committee but not in charge of the bill, vigorously opposed it (*id.*, 3186). His statement is quoted in Appendix "B", *infra*, pp. 41-42. The inclusion of the exemption in the bill as finally adopted, combined with the subsequent enactment of similar exemptions in later statutes and their ultimate embodiment in R. S. § 3701, preclude any contention that R. S. § 3701 should be construed to be less extensive than the constitutional prohibition implied by this Court in the contemporaneous bank cases already cited (pp. 18-20).

In the comparatively recent case of *Smith v. Davis*, *supra*, this Court interpreted R. S. § 3701 as not applying to an open account claim of a creditor of the United States, but only to obligations or securities of the type enumerated in the statute. The Court stated (323 U. S. at 117):

"This interpretation accords with the long established Congressional intent to prevent taxes which diminish in the slightest degree the market value or the investment attractiveness of obligations issued by the United States in an effort to secure necessary credit."

The judgment of the Supreme Court of New Jersey, if allowed to stand, would subvert that intent of Congress.

The action of Congress, discussed under Point III, in enacting the Public Debt Act of 1941, and therein modifying R. S. § 3701 only to the limited extent of authorizing Federal taxation of the income from United States bonds and like securities, tends to strengthen still further the view that R. S. § 3701 is applicable herein. The history of this modification shows that the sponsors were cognizant of this Court's decisions in the field,* and deliberately re-

* Comprehensive and detailed analyses of many of this Court's decisions are found in both the majority and minority reports of the Special Committee on Taxation of Governmental Securities and Salaries, issued in 1940 under the title "TAXATION OF GOVERNMENTAL SECURITIES AND SALARIES." Sen. Rept. No. 2140, Parts 1 and 2, 76th Cong., 3d Sess.

frained from proposing any amendment which would affect either the immunity of Federal securities from state taxation, or the immunity of state securities from Federal taxation, as developed in those decisions. 87 Cong. Rec. 851-852, 1005-1010.

III

The Public Debt Act of 1941, as amended, does not authorize state or municipal taxation of the income from United States bonds, and the accrued interest on appellant's Bonds is immune from such taxation to the same extent as the principal.

The court below in its opinion made no distinction between the question of the immunity of the principal of the Bonds owned by appellant and the question of the immunity of the accrued interest thereon. Appellant agrees that no such distinction should be made. None has been made by this Court. *Willcuts v. Bunn*, 282 U. S. 216, 227-228; and cases, *supra*, pp. 18-24.

The former New Jersey Supreme Court, however, included in its opinion a statement to the effect that, by virtue of the Public Debt Act of 1941, as amended (quoted *infra*, p. 40 and hereinafter called "§ 742a."), the exemption from State taxation provided in R. S. § 3701 (31 U. S. C. § 742) does not extend to interest upon bonds or similar securities of the United States issued on or after March 28, 1942 (R. 19-20). Since most of the Bonds owned by appellant were issued subsequent to that date (R. 9), the validity of that statement is presented as a question which should be determined so that proper disposition will be made on remand.

Appellant submits that the former New Jersey Supreme Court misapprehended the scope of § 742a. That section in its original form was enacted as Section 4 of the Public Debt Act of 1941. The full title of that Act was:

"An Act: To increase the debt limit of the United States, to provide for the *Federal* taxation of future issues of obligations of the United States and its instrumentalities, and for other purposes." (Emphasis supplied) (55 Stat. 7).

While the section did not and does not in terms specify that its provisions apply only to Federal taxation, any possible ambiguity is resolved by resort to the legislative history.

The bill, which became the section, was introduced in the House by Chairman Doughton of the Ways and Means Committee, who stated (87 Cong. Rec. 852):

"The bill makes absolutely no change in existing law with respect to the Federal taxation of State and local securities or the State taxation of Federal securities. The change applies only to the Federal Government's taxation of its own securities and the securities of its agencies and instrumentalities * * *."

Senator Brown, who was in charge of the bill in the Senate as Chairman of the Special Committee on Taxation of Governmental Securities and Salaries, stated (87 Cong. Rec. 1003):

"It (the bill) taxes the income from obligations of the Federal Government or its instrumentalities, for the purpose of the Federal income tax * * *. It does not give the States any right to tax the income from Federal obligations."

and further (87 Cong. Rec. 1006):

"With respect to federal taxation, we provide in the pending Bill that from this time on no more federal tax-exempts shall be issued. I do not mean by that that the State of New York or any other State which has power under its own laws to tax income, may tax the income from federal bonds. They would not be

permitted to do so under this Bill. But we do make our future federal issues liable to all federal income tax."

In 1947, when the most recent amendment to the section was proposed and enacted, the Senate Committee on Finance rendered a report (Sen. Rept. No. 275, 80th Cong., 1st Sess.) which again specified that the section

"* * * did not change the existing law with respect to the taxation of Federal securities by the States and their political subdivisions."

(See U. S. Code Cong. Service, 80th Cong. 1st Sess. 1947, p. 1217. See also (Note) 61 Harv. L. Rev. 1245, 1246.)

In view of the foregoing, and this Court's decisions, there can be no doubt that, if the proviso clause and assessment herein are invalid as applied to the principal of the Bonds owned by appellant, they are invalid also as applied to the accrued interest.

Conclusion

The judgment of the Supreme Court of New Jersey should be reversed and the cause remanded for the purpose of correcting the assessment by basing it on the sum of appellant's paid up capital and surplus after deducting the value of the United States Treasury Bonds and accrued interest thereon owned by appellant; and for the purpose of restoring to appellant, pursuant to New Jersey law, the excessive tax collected.

Respectfully submitted,

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Dated: November 1, 1949.

Appendix "A"

Provisions of the Revised Statutes of New Jersey additional to those quoted on pages 3-5 of this brief, and pertinent to be considered therewith, are set forth below. They are followed on page 40 by quotation of the pertinent provisions of the Public Debt Act of 1941.

Several of the New Jersey provisions, as indicated, while enacted in April 1945, were declared not to affect earlier assessments. The provisions which are cited below only by their section number in the Revised Statutes of New Jersey, and without citation of the particular public law by which they were added, were in effect throughout 1945 and at the time of the assessment herein.

Section 54:4-1 of the Revised Statutes (quoted, *supra*, p. 5) was amended by L. 1945, c. 163, § 1 (R. S. Cum. Supp. 54:4-1), effective April 13, 1945, by insertion of the following between the first and second sentences:

"Personal property taxable under this chapter shall include, however, only tangible goods and chattels and shall not include any intangible personal property whatsoever whether or not such personality is evidenced by a tangible or intangible chose in action, except as otherwise required by sections 54:4-20, 54:4-21 and 54:4-22 hereof."

(Section 9 of the same statute (L. 1945, c. 163), as incorporated in R. S. Cum. Supp. 54:4-1.1, provides in part:

"54:4-1.1. Construction of act; assessment of intangible personal property omitted by assessor prohibited. Nothing herein shall be construed to affect any pending litigation, nor to repeal, abate, cancel, cause to lapse, or otherwise affect in any manner, any assessment or the lien or obligation to pay any taxes heretofore assessed to any taxpayer, or the legal authority to collect taxes, interest and penalties which

Appendix "A".

have accrued under any provision of law repealed by this act * * *; provided, however, that * * * no county board of taxation shall by resolution cause to be entered upon the tax duplicate an assessment against any intangible personal property omitted by the assessor, nor entertain any complaint for the adding of omitted intangible personal property, * * *.)

"54:4-2. Taxation of property of corporations. Except as otherwise provided as to particular corporations, all property, real and personal, of a corporation shall be taxed the same as the real and personal property of an individual."

"54:4-9. Personal property; where assessed. The tax on all tangible personal property in this state and on all taxable personal property of nonresidents of this state, except as otherwise provided in this title, shall be assessed in and for the taxing district where the property is found. The tax on other personal property shall be assessed on each inhabitant in the taxing district where he resides on October first in each year."

"54:4-18. Taxation of personality of domestic corporations. Corporations of this state shall be regarded as residents and inhabitants of the taxing district where their chief office is located, and their personal property shall be taxed the same as that of an individual, except as in this chapter otherwise provided."

* By L. 1945, c. 163, § 3, effective April 13, 1945, this section was amended to read as follows; but earlier assessments were not to be affected, as was provided in § 9 (R.S. Cum. Supp. 54:4-1.1; quoted *supra*, p. 35):

"54:4-9. Personal property; where assessed. The tax on all tangible personal property in this state shall be assessed in and for the taxing district where the property is found."

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(Section 2 of L. 1945, c. 163, repealed the above section, but as provided in § 9 (R. S. Cum. Supp. 54:4-1.1, *supra*, p. 35) earlier assessments were not affected.)

"54:4-35. Period of assessing; assessor's duplicate.

The assessor shall begin the work of making assessments upon real and personal property on October first in each year and shall complete the work by January tenth following, on which date he shall attend before the county board of taxation and file with the board his complete assessment list, and a true copy thereof, to be called the assessor's duplicate, properly made up and legibly written in ink, to be examined, revised and corrected by the board as hereinafter provided."

"54:4-36. Assessor's affidavit; form and content.

The assessor shall annex on his assessment list and duplicate so filed, his affidavit in substantially the following form:

"I, , assessor of the of , do swear (or affirm) that the foregoing list contains the valuations made by me to the best of my ability, of all the property liable to taxation in the taxing district in which I am the assessor, and that I have valued it, without favor or partiality, at its full and fair value, at such price as in my judgment it would sell for at a fair and bona fide sale by private contract on October first last, and have made such deduction only for debts and exemptions as are prescribed by law'."*

"54:4-105.1. Credit on taxes due upon reduction by board. If any taxpayer shall have paid the taxes upon

* This section was amended twice in 1945. L. 1945, c. 163, § 7; and L. 1945, c. 260, § 2. The combined result of these was merely to change "on" to "to" in the first line of the text, and to insert "except as otherwise provided by law" after "October first last."

Appendix "A".

any assessment of property under the provisions of chapter four of Title 54 of the Revised Statutes and shall, upon appeal, have obtained a judgment of the county board of taxation granting a reduction in the said assessment from which neither the taxpayer nor the municipality shall have duly appealed, or shall have obtained a judgment of the state board of tax appeals granting a reduction in such assessment or confirming a reduction granted by the county board or any part thereof, such taxpayer may claim and the collector of taxes of the municipality shall allow a credit, in an amount equal to the appropriate refund incident to such reduction of said assessment, against any taxes then due or to become due on such property; provided, such property is at that time assessed against the same owner as it was at the time the appealed assessment was made. If said assessment shall be further litigated the taxes found to be due as a result of such litigation, either by way of increase or reduction, shall be adjusted in like manner."

The Corporation Business Tax Act (1945), L. 1945, c. 162, which became effective January 1, 1946, contained the following provisions which are quoted as they appear under Title 54, Subtitle 4 ("PARTICULAR TAXES ON CORPORATIONS AND OTHERS"), Part 1, Chapter 10A, in R. S. Cum. Supp.:

"54:10A-2. Annual franchise tax; foreign corporations. Every domestic or foreign corporation which is not hereinafter exempted shall pay an annual franchise tax for the year one thousand nine hundred and forty-six and each year thereafter, as hereinafter provided, for the privilege of having or exercising its corporate franchise in this state, or for the privilege of doing business, employing or owning capital or property, or maintaining an office, in this state. And

Appendix "A".

such franchise tax shall be in lieu of all other state, county or local taxation upon or measured by intangible personal property used in business by corporations liable to taxation under this act [chapter]."

• • • • •

"54:10A-3. Exempt corporations. The following corporations shall be exempt from the tax imposed by this act [chapter]:

(a) corporations subject to a tax under the provisions of article two of chapter thirteen of Title 54 of the Revised Statutes, or to a tax assessed upon the basis of gross receipts or insurance premiums collected; • • •"

L. 1945, c. 132, effective April 10, 1945, contained, *inter alia*, the following provisions which are quoted as they appear under Title 54, Subtitle 4, Part 3A. ("TAXATION OF INSURERS GENERALLY"), Chapter 18A ("TAXATION OF CORPORATIONS • • • TRANSACTING INSURANCE BUSINESS"), in R. S. Cum. Supp.:

"54:18A-1. Payment of annual tax. Every stock, mutual and assessment insurance company organized or existing under any general or special law of this state, and every stock, mutual and assessment insurance company organized or existing under the laws of another state or foreign country and transacting business in this state shall pay to the director of the division of taxation an annual tax, in each calendar year on or before the first day of June, in the amount specified in sections two [R. S. Cum. Supp. 54:18A-2] and three [R. S. Cum. Supp. 54:18A-3] of this act [chapter]."

"54:18A-2. Amount of tax on companies other than life and marine insurance. The tax specified in section

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one [R. S. Cum. Supp. 54:18A-1] of this act [chapter], except as to life insurance companies and except as to marine insurance as described by chapter sixteen of Title 54 of the Revised Statutes, shall be two per centum (2%) upon the taxable premiums collected by such company during the year ending December thirty-first next preceding on all business of the company in this state, less the amount of any franchise taxes and taxes on its property, exclusive of taxes on real estate and of taxes payable pursuant to this section, paid in this state by the company pursuant to any law of this state during the said year. * * * *

* * *

The Public Debt Act of 1941 (55 Stat. 9, as amended in 1942, 56 Stat. 190, and in 1947, 61 Stat. 180, and as appearing in Title 31, United States Code, Sec. 742a), provides insofar as here pertinent:

"(a) Interest upon obligations, and dividends, earnings, or other income from shares, certificates, stock, or other evidences of ownership, and gain from the sale or other disposition of such obligations and evidences of ownership issued on or after the Public Debt Act of 1942, by the United or any agency or instrumentality thereof shall not have any exemption, as such, and loss from the sale or other disposition of such obligations or evidences of ownership shall not have any special treatment, as such, *under the Internal Revenue Code, or laws amendatory or supplementary thereto.*" * * * (Italics supplied.)

(b) The provisions of this section shall, with respect to such obligations and evidences of ownership, be considered as amendatory of and supplementary to the respective Acts or parts of Acts authorizing the issu-

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ance of such obligations and evidences of ownership, as amended and supplemented."

The words of subsection (a) shown above in italics were substituted by the 1947 amendment for "Federal Tax Acts now or hereafter enacted", which had been the language. See H. Rept. No. 423, 80th Cong., 1st Session; and Senate Rept. cited *supra*, p. 34.

Appendix "B"

The excerpt from the Congressional Globe, 38th Cong., 1st Sess., Pt. 4, p. 3186, referred to on page 31 of this brief is:

"Mr. Noble: I move to amend the amendment by substituting the following:

And all bonds, Treasury notes, and other obligations of the United States, shall be subject to State and municipal taxation, on equal terms, the same as other property.

Mr. Stevens: I suppose the object is to prevent the sale of bonds so as to prevent the further indebtedness of the United States. The vote already taken has been sufficient, I think, to entirely prevent the sale of any one of these bonds. I do not believe that if we adopt that provision, and it comes to be known, by implication even, that States may tax these bonds, one dollar will ever be invested in them.

The policy of the Government has heretofore been not to allow State taxation of the bonds of the General Government for two reasons: in the first place, that they would meet with a readier sale if not subject to State taxation; and in the second place that the Government might, in a case of extraordinary necessity like the present, monopolize the entire revenue to be derived from this description of taxation.

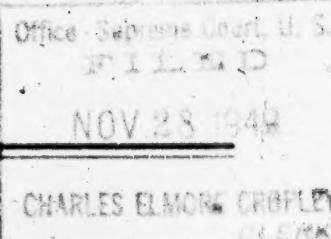
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But it seems that now the gentleman from Indiana proposes directly to grant permission to all the States to tax the bonds of the Government. Sir, no man of any wisdom as a capitalist will ever invest a dollar in bonds of that kind. Why, sir, it would subject the governmental bonds to every whim and every change of polities in every State. If a particular Administration of the Government was unpopular with the authorities of a particular State, and they desired to place themselves in an attitude of hostility to the Government, all they would have to do would be to tax the bonds of the Government out of existence; to tax them to such an extent as would be impossible for the Government to stand. That is the attitude in which honorable gentlemen have placed the country by the vote which has just been taken.

Of course every gentleman has the right to vote as he pleases, but it ought to be known that the effect of it is to place the Government at the mercy of the whims, caprice, and malignity of any political party happening for the time being to be in control of a State government.

Now, sir, if when we come into the House the amendment which has just passed this committee should be adopted, I hope my friend from Massachusetts, who has charge of this bill, will be wise enough to withdraw it, and not attempt to put upon the market bonds which no prudent man will ever buy."

LIBRARY
SUPREME COURT, U. S.



Supreme Court of the United States

OCTOBER TERM, 1949.

No. 147

NEW JERSEY REALTY TITLE INSURANCE
COMPANY,

Appellant,

vs.

DIVISION OF TAX APPEALS IN THE DEPARTMENT
OF TAXATION AND FINANCE OF THE STATE OF
NEW JERSEY, and THE CITY OF NEWARK,

Appellees.

**APPEAL FROM THE SUPREME COURT OF THE STATE
OF NEW JERSEY.**

BRIEF FOR APPELLEE, THE CITY OF NEWARK.

CHARLES HANDLER,
*Attorney for Appellee, The
City of Newark.*

VINCENT J. CASALE,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1949.

No. 147.

NEW JERSEY REALTY TITLE INSURANCE COMPANY,
Appellant,

vs.

DIVISION OF TAX APPEALS IN THE DEPARTMENT OF TAXATION
and FINANCE OF THE STATE OF NEW JERSEY, and THE
CITY OF NEWARK,

Appellees.

Appeal from the Supreme Court of the State of New Jersey.

BRIEF FOR APPELLEE, THE CITY OF NEWARK.

Questions Presented.

1. Whether the Supreme Court of the State of New Jersey erred in holding that the tax assessed by the taxing district of the City of Newark on 15% of the paid-up capital and surplus in excess of the total of all liabilities after deducting the assessments against all real estate of the appellant, under 54:4-22 of the Revised Statutes of New Jersey, as amended by Chapter 245 of the Pamphlet Laws of 1938, is a valid excise or indirect tax even though there be included in the calculation of the net worth of the company certain exempt federal securities or their income.

2. Whether said tax under the New Jersey statute violates the Borrowing Clause (Art. 1, Sec. 8, Cl. 2), the Supremacy Clause (Art. VI, Cl. 2), Section 3701 of the Revised Statutes of the U. S. or the Public Debt Act of 1941, as amended (55 Stat. 9, 56 Stat. 190, 61 Stat. 180; 31 U. S. C. A. § 742a).
3. Whether the decision of the Supreme Court of New Jersey is in conflict with the decisions of the Supreme Court of the United States.

Statement.

The appellant is a stock insurance company subject to taxation under the New Jersey Statute set forth on page 3 of appellant's brief, R. S. 54:4-22, as amended by Chapter 245 of the Laws of 1938. R. S. 54:4-22, as it was before the amendment, is set forth in Appendix "A". The appellee, the taxing district of The City of Newark, levied an assessment of \$75,700.00 upon the intangible personal property of the appellant, as of October 1, 1944, for the tax year 1945—which is 15% of its net worth—in accordance with the above statute. The appellant contended that the tax imposed was a direct tax upon bonds of the United States and therefore unconstitutional.

The highest court of the State of New Jersey held that the tax imposed was not a direct tax upon such exempt bonds, and that the tax was constitutional. This is an appeal from that decision.

Summary of Argument.

I.

The state power of taxation is unlimited in extent, except as it may be restrained by constitutional provisions. It is the most basic power of government, and the function of this Court is limited, because the restriction that the Constitution places upon the states is extremely limited.

II.

This Court will give great weight to the characterization of a tax, or the interpretation of a state law, emanating from the highest court of the State, but, of course, will determine the true nature of the tax, where a federal question is involved, by ascertaining its operation and effect. However, the burden is upon one asserting the unconstitutionality of a statute to overcome the presumption of facts supporting constitutionality attaching to all legislative acts. The operation of the tax here is to use net worth as the measure of the tax and its effect is not a direct tax upon exempt government securities, but an indirect tax upon whatever makes up the net worth. It is an excise tax which may be measured by assets or income not subject to direct taxation. The distinction, which is significant, is that between *subject* and *measure*. Also there is no intent in the New Jersey Statute to aim at the bonds of the United States, and the statute has only a casual effect upon them.

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III.

The tax involved is not unconstitutional because it is not a property tax upon government securities or their income, and therefore the decisions of the Supreme Court of the United States, cited on pages 18-21 of appellant's brief, do not apply to the instant case. Said cases involve *ad valorem* or direct property taxes and the constitutional principles involved therein are not attacked here nor need to be overruled, as the appellant seems to contend, for the Supreme Court to sustain the New Jersey decision. Those cases are—*McCulloch v. Maryland*, 4 Wheat. 316 (1819); *Osborn v. U. S.*, 9 Wheat. 738 (1824); *Weston v. City Council of Charleston*, 2 Pet. 499 (1829); *Bank of Commerce v. New York City*, 2 Black 620 (1863); *Bank Tax Case*, 2 Wall. 200 (1864); *The Bank v. The Mayor*, 7 Wall. 16 (1868); *Farmers Bank v. Minnesota*, 232 U. S. 516 (1914); *United States v. Allegheny County*, 322 U. S. 174 (1944).

IV.

The nature of the tax in this case being such that it is not upon the federal securities but an excise upon a New Jersey corporation, there is no quarrel about established constitutional principles. If the tax is not upon federal securities but upon something else, as here, which is taxable, then the decisions of this court holding federal securities immune from taxation have no bearing upon this case.

A consideration of this Court's decisions in *Home Insurance Co. v. New York*, 134 U. S. 594 (1890); *Flint v. Stone Tracy Co.*, 220 U. S. 107 (1910); *Miller v. Milwaukee*,

U. S. 713 (1927); *Long v. Rockwood*, 277 U. S. 142 (1928); *Macallen Co. v. Mass.*, 279 U. S. 620 (1929); *Willis v. Bunn*, 282 U. S. 216 (1931); *Educational Films Corp. v. Ward*, 282 U. S. 379 (1931); *Lawrence v. State Tax Com.*, 286 U. S. 276 (1932); *Schuylkill Trust Co. v. Pennsylvania*, 286 U. S. 112 (1935); *James v. Draro Contracting Co.*, 302 U. S. 134 (1937); *Wisconsin v. J. C. Penney Co.*, 311 U. S. 166 (1940), do not lead to a conclusion contrary to the finding of the Supreme Court of New Jersey as to the nature of the tax here and its validity under undoubted constitutional principals.

ARGUMENT.

I.

The power of taxation by the State is the most basic power of government and therefore is unlimited in extent, except as it may be restrained by constitutional provisions.

A state government is exercising the most plenary of sovereign powers when it, through its legislative branch, acts laws to raise revenue to defray the expenses of government and to distribute its burdens justly among those who enjoy its benefits. The Constitution provides no particular modes of taxation by the States, and they are left restricted in their power to tax those domiciled within them, except insofar as the Constitution gives the Federal government a specific grant of the exclusive power to levy certain limited classes of taxes and to regulate interstate and foreign commerce. The state, of course, must place

the tax upon property within the State or on privileges enjoyed there, and the tax must not be so palpably arbitrary or unreasonable as to infringe the 14th Amendment.

Lawrence v. State Tax Commission, 286 U. S. 276 (1932); *James v. Dravo Contracting Co.*, 302 U. S. 134 (1937); *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435 (1940).

This Court, in *Wisconsin v. J. C. Penney Co.*, *supra*, speaking through Mr. Justice Frankfurter, explicitly and directly covered this point with the following all-embracing language, on page 44, *et seq.*:

"The constitution is not a formulary. It does not demand of states strict observance of rigid categories nor precision of technical phrasing in their exercise of the most basic power of government, that of taxation. For constitutional purposes the decisive issue turns on the operating incidence of a challenged tax. A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society."

"The simple but controlling question is whether the state has given anything for which it can ask return. The substantial privilege of carrying on business in Wisconsin, which has here been given, clearly supports the tax, * * *."

"This analysis is merely a reformulation of the classic approach of this court to the taxing power of the states: *Lawrence v. State Tax Com.*, 286 U. S. 280. Ambiguous intimations of general phrases in opinions torn from the significance of concrete circumstances or even occasional deviations over a long

course of years, not unnatural in view of the confusing complexities of tax problems, do not alter the limited nature of the function of this Court when State taxes come before it. At best, the responsibility for devising just and productive sources of revenue challenges the wit of legislators. Nothing can be less helpful than for courts to go beyond the extremely limited restrictions that the Constitution places upon the States and to inject themselves in a merely negative way into the delicate processes of fiscal policy-making. We must be on guard against imprisoning the taxing power of the States within formulas that are not compelled by the Constitution, but merely represent judicial generalizations exceeding the concrete circumstances which they propose to summarize."

There must be maintained the essential freedom of government in performing its functions without unduly limiting the taxing power which is equally essential to both federal and state governments under our dual system, and, in a given case, the tax involved, of one sovereignty may have a remote influence upon the exercise of the functions of government of the other.

This Court said in *Metcalf v. Eddy Mitchell*, 269 U. S. 514 (1926), at page 553:

"In a broad sense, the taxing power of either government, even when exercised in a manner admittedly necessary and proper, unavoidably has some effect upon the other."

II.

The decision of the highest court of the State interpreting the statute and finding that this tax thereunder is an excise or indirect tax and not a property tax will be given great weight by this Court in its determination of the nature of the tax, by ascertaining its operation and effect.

This is a cardinal principle adhered to by this Court. In 1879, in *Douglas v. Pike County*, 101 U. S. 677, 687, Chief Justice Waite, speaking for the Court, reaffirmed it, saying:

"The language of Chief Justice Taney, in *Rowan v. Runnels*, 5 How. 134, expresses the true rule on this subject. He said, p. 139: 'Undoubtedly, this court will always feel itself bound to respect the decisions of the state courts and, from the time they are made, regard them as conclusive in all cases upon the construction of their own laws.' "

Also on the same point is *Schuylkill Trust Co. v. Penna.*, 296 U. S. 113, 119 (1935), but in that case the majority found that the operation and effect of the tax disclosed discrimination against federal securities. No such discrimination, solely by reason of ownership of such federal securities, is found in our case.

Grants of immunity from taxation are strictly construed. *Pacific Co. v. Johnson*, 285 U. S. 480 (1932).

Also the burden is always upon one asserting the unconstitutionality of a statute to overcome the presumption of facts supporting constitutionality attaching to all legislative acts. *Lawrence v. State Tax Commission, supra*.

From a reading of the statute here involved there was no avowed purpose to tax federal bonds or their income directly. In fact, in the formula part of the statute, non-taxable property and property exempt from taxation is expressly excluded (R. 24). It is in the proviso that the assessment calculated under the formula shall in no event be less than 15 per cent of the net worth, and it was under that proviso that the instant tax was assessed. Therefore, net worth being the ultimate measure of the tax here, it was an excise or indirect tax. The most that can be said here is that there was an indirect unintentional effect upon federal instrumentalities and no undue burden upon them. Nor can it be said that this statute was passed for the very purpose of including exempt securities in the measure of the excise.

The former statute (Appendix "A"), which was in force until this statute was passed in 1938, provided for an assessment upon the *full amount* of the capital stock paid in and accumulated surplus. It might be well to interpolate here that a comparison of said former statute and the 1938 amendment indicates that the latter was in the nature of a concession to such insurance companies to reduce their taxes, not to relieve them from taxation, as was the claim in the return filed with the taxing district of the City of Newark (R. 6), the petition of appeal to the Division of Tax Appeals (R. 4), and to the Essex County Board of Taxation (R. 5), all for the tax year 1945, as of the taxing date October 1, 1944. The present statute was conceded by them to be valid from 1938 till 1945, because no attack was made against it until this one by a single insurance company. In this regard there is appropriate language by the high-

est court of New Jersey, in *State Board of Assessors vs. Central R. R. Co.*, 48 N. J. L. 146 (1886), where the court said:

"The fact that railroad property, when the Act of 1884 was passed, had been separately taxed under similar legislation, both for state and local purposes, and for so many years, and that the validity of such legislation on the ground of unconstitutionality had not been brought to any judicial test, although immense interests in the hands of vigilant guardians had been annually affected by it, is an important circumstance in the consideration of the question now before the court."

It must be evident that if the decision of the Supreme Court of New Jersey is not upheld, it will work financial havoc with the tax structure of the City of Newark. In this small insurance company alone, the assessment would drop from \$75,700.00 to about \$6,700.00. See note at bottom of page 9 of appellant's brief.

The City of Newark therefore respectfully urges this Court to apply economic realism in upholding constitutionality here, as there is no effect seriously adverse to the Federal Government in this indirect tax. Ordinarily, this Court will look at the effect of the tax upon the Federal Government, not upon the appellant corporation. Every change in the taxing methods of a state affects in some degree the federal borrowing power, but it would be unwise to economically hamper a state by forbidding all legislation having such incidental consequences. Only such taxes as bear directly upon federal instrumentalities should be condemned.

The New Jersey statutes in effect on October 1, 1944, are the only ones to be considered on this appeal; therefore, subsequent enactments set out in the body of appellant's brief and in its Appendix "A" are immaterial to the issue.

It is respectfully contended that the appellant has not overcome the presumption of constitutionality.

Since the appellant sets forth in the Transcript (R. 19) and its brief mentions the opinion of the former New Jersey Supreme Court, which was reversed by the present Supreme Court of New Jersey (R. 24, *et seq.*), now the highest Court in the State (having superseded the former Court of Errors and Appeals), we desire to point out, in passing, that the former New Jersey Supreme Court did not cite any decision of the Supreme Court of the United States in its opinion.

III.

The decisions of this Court declaring unconstitutional State ad valorem or direct property taxes upon an instrumentality of the Federal Government have no application to this excise or indirect tax levied upon a subject within the State's power, which is measured in part by elements themselves exempt from State taxation.

We find no fault with the principles set forth in Point I of the Argument in Appellant's Brief, and the cases cited, beginning with *McCulloch v. Maryland*, *supra*, that a statute which taxes, without any consent of Congress, bonds issued by the United States, infringes the Borrowing and

Supremacy Clauses of the Federal Constitution. In our case we have no such direct property tax. Furthermore, the tax in question, not being a direct property tax, does not violate Section 3701 of the Revised Statutes of the United States, nor the Public Debt Act of 1941, as amended.

The cases cited in Appellant's Brief, under Point I, p. 18-21, do not have to be overruled by this Court, as the Appellant contends, if it decides to affirm the judgment below.

By necessary implication from the Constitution, the States have not been allowed to tax federal instrumentalities. The doctrine was first enunciated by Chief Justice Marshall in *McCulloch v. Maryland* in 1819. It was followed by *Weston v. City Council of Charleston, supra*, involving a tax on government stock, *Bank of Commerce v. New York, supra*, and *Bank Tax Case, supra*, both involving a tax upon corporate capital. In these and other cases, a State attempted to levy a non-discriminatory tax on a subject matter not within its sovereignty.

After the Civil War, a distinction was drawn between a tax levied upon a federal instrumentality, and a tax levied upon a subject within the State's power, which was measured in part by elements themselves exempt from state taxation. So in *Society for Savings v. Coite*, 6 Wall. 594 (1868), a state was allowed to measure by deposits its tax for the privilege of exercising corporate functions; in *Hamilton Co. v. Mass.*, 6 Wall. 632 (1868), by capital excess; in *Home Ins. Co. v. New York*, 134 U. S. 594 (1890), by capital stock; in *Plummer v. Coler*, 178 U. S. 115 (1900), to determine the tax upon the privilege of inheritance by the deceased's total property; and in *Van Allen v. Assessors*, 3

Wall. 573 (1866), to assess stockholders in proportion to the full value of their shares. In each of these cases the tax was larger because in its computation either the principal of, or the interest on, federal securities was included.

This line of cases which sustained the validity of excise taxes measured by elements protected under the federal instrumentality doctrine was further confirmed, when, conversely, it was held in *Flint v. Stone Tracy Co.*, 220 U. S. 107 (1910), that the Federal Government could levy upon corporations an excise tax measured by net income, including income from tax-exempt state securities.

The present case, where the excise is measured by net worth, is similar to and is sustained by this line of cases.

A perusal of the mandate of reversal in this case (R. 28), which affirmed the tax, and a study of the opinion of the Supreme Court of New Jersey (R. 24-28), upon which it is based, indicates that the court upheld the constitutionality of the statute and the tax thereunder in conformity with the decisions of this court, which are cited in the opinion. As we said before, the opinion, upon which the judgment which it reversed was based, did not cite even one decision of this Court in its favor.

The contention in Appellant's Brief against the validity of the decision here under appeal must fall if the opinion properly concluded "that the tax levied under this statute is not an *ad valorem* tax or property tax, but rather is a valid tax upon the net worth of the company even though there be included in the calculation of the net worth certain exempt federal securities or their income." (R. 26). When it says, on page 26 of its brief, that there is a close similar-

In *Miller v. Milwaukee, supra*, a state was forbidden to tax so much of a stockholder's dividends as corresponded to the corporate income not previously assessed, because there was discrimination against income which had its source in interest paid by the United States. The Court said that

"A tax very well may be upheld as against any effect it may have upon the bonds of the United States when passed with a different intent and not aimed at them, but it becomes a more serious attack upon their immunity when they are its obvious aim."

There was no such intent or aiming at Federal securities, that is, no discrimination, in our case.

In *Long v. Rockwood, supra*, this Court held that income from patents is immune from direct taxation by a state. This was a direct tax, and so differs from our case.

Then came the case of *Macallen Co. v. Mass., supra*, in which this Court, under the special facts there disclosed, ruled that the inclusion of income from Federal bonds in the measure of a franchise tax resulted in the imposition of an unconstitutional burden upon a Federal instrumentality. This Court found that the statute attacked was passed "for the very purpose" of including such income. There are no such special facts or express purpose in the statute here under attack, as a reading of it and the prior statute (Appendix "A") which it amended, readily discloses.

It is important to note that in the *Macallen* case this Court expressly recognized the binding authority of *Flint v. Stone Tracy Co. and Home Insurance Co. v. New York, supra*.

In *Willcuts v. Bunn, supra*, this Court held that immunity from taxation does not extend to the profits derived by their owners from the sale of government bonds. The Court said there:

"The power to tax is no less essential than the power to borrow money, and, in preserving the latter it is not necessary to cripple the former by extending the constitutional exemption of taxation to those subjects which fall within the general application of non-discriminatory laws, and where no direct burden is laid upon the governmental instrumentality and there is only a remote, if any, influence upon the exercise of the functions of government."

The above applies aptly to our case.

Shortly after, in 1931, came the case of *Educational Films Corp. v. Ward, supra*, which held that where a franchise tax measured by entire net income was imposed upon a domestic corporation, income derived from royalties for the use of copyrights was properly included within the measure. The *Macallen* case can be distinguished from the above case, because in the *Macallen* case the State specifically excluded income from Federal bonds and then by amendment excluded the prior specific exclusion, while in the above case the State by its original statute made no mention of income from Federal bonds, so that there was no discrimination, because the statute imposing the tax used general terms and made no specific reference to such income from Federal bonds.

An analytical discussion of these cases and their impact upon the constitutional considerations involved in the broad doctrine of inter-governmental relations, was given an ex-

ity here with the *Bank of Commerce* line of cases, it loses sight of the difference between a direct tax upon corporate capital and an indirect tax measured by corporate capital. And when it says that in the opinion below the court spelled out a property tax, and not an indirect tax, it shows that it tried to distort the meaning of certain words taken by themselves and not considered as part and parcel of the entire wording of the entire opinion. The opinion is explicit that the tax is not a property tax. Irrespective of what appellant says about the operation of the proviso, the terms of the statute, the context and scheme of the statute, and the administration of the statute, the highest court of New Jersey has spoken clearly on these matters. This Court will, we believe, decide that it has spoken correctly according to the decisions of the highest court in the land. Contra to the logical interpretation, the appellant, on page 27, says that, "The tax, when levied, is based not on income, but solely on a valuation of property." Nothing could be further from the truth and the facts here, because the tax is measured by wealth and the 15% is the floor. Also the tax does not depend on whether the capital and surplus was comprised of exempt or non-exempt intangibles.

The statute was not couched in the happiest of terms, but that did not make it impossible for the court below to properly construe it and find its true meaning. As this Court said, in *Laurence v. State Tax Commission, supra*:

... * * in passing on its constitutionality we are concerned only with its practical operation; not its definition or the precise form of descriptive words which may be applied to it."

What the appellant tries to deduce from the context and position of the statute in the Revised Statutes of New Jersey is not dispositive of its true nature. The position in the text does not make it a property tax, if, in fact, as here, its actual meaning and effect show it to be an indirect tax. As this Court said, in *Pacific Co. v. Johnson*, 285 U. S. 480 (1932):

“But we do not rest our decision upon any narrow distinction as to the precise form of words which may be employed in a taxing statute, or the particular order in which its provisions are incorporated in the statute. * * *.”

Of course, as stated before, New Jersey statutes enacted after October 1, 1944, have no place in this discussion.

The contention made in Appellant's Brief as to how the statute seemed to be regarded by its administrators or the former Supreme Court is entirely beside the point now that the highest court of the state has finally decided that this is not a property tax but an indirect tax. That court gave the final say as to its nature in New Jersey.

The court below in its opinion properly characterized this situation when it said (R. 26, fol. 36):

“As we read R. S. 54:4-22, as amended, it does not tax the capital or surplus as such. The proviso in the statute simply fixes a floor below which the assessment under the formula is not permitted to go. In the operation of the formula an assessment in excess of 15 percent of the sum of paid-up capital and surplus is possible and when so found is taxable at the local rate. However, when a minus sum is the result of the operation of the formula, then the as-

essment is recalculated and the exclusions and deductions are accordingly reduced so as to produce an assessment against the intangible property which is not less in amount than 15 percent of the paid-up capital and surplus."

And further (R. 26, 27, fol. 37):

"While it is true that the legislature authorizes that certain property shall be excluded and exempted from the assessment and also permits certain other deductions and that our legislature, in the exercise of its reserve power, may alter or change any and all such items, they are not at the point of assessment fixed factors in the arithmetical taxing formula but are variable factors, because the legislature went one step further by the proviso which authorizes that these (fol. 37) various items shall be accordingly reduced with the ultimate purpose to produce an assessment of the net worth of all the intangible property of the insurance company which in the aggregate may not be less in amount than 15 percent of the paid-up capital and surplus as defined by the statute. The assessment may equal or exceed 15 percent of the paid-up capital and surplus, and does not necessarily have to be precisely the same, but it can not be less in amount than 15 percent of the paid-up capital and surplus."

Then finally the Court said (R. 27, fol. 38):

"The statute is not designed to tax capital or surplus as such or any assets alleged to be included therein."

So there was not any question of forbidden discrimination involved.

IV.

Where the tax is not upon Federal securities or their income but is an excise or indirect tax upon a corporation, the recognized constitutional principles are not in issue, because there is no constitutional impediment in such a case to the State's exercise of its taxing power.

There remains to be considered if any of the decisions of this Court, in the cases mentioned by name under *IV* of Summary of Argument, *supra*, page 4, affect, adversely, the finding of the court below as to the nature of the tax here and its validity under undoubted constitutional principles.

If, as we contend, the tax now before the Court is not a tax on Federal securities or their income, then those securities and income are not taxed, and the question whether they are taxable is not involved. It is only the nature of the tax which is at issue here, whether or not it is under a *power possessed* by the State upon a legitimate subject of taxation. If it were under a *power denied* to the State, as it would be if it were a property tax, then only would it be unconstitutional.

The cases mentioned, which we will discuss now, do not call for a reversal of the Court below, but an affirmance.

Home Insurance Co. v. New York, supra, and *Flint v. Stone Tracy Co., supra*, belong to that line of cases holding that it is within the powers of a state to enact a tax upon exercising corporate privileges which may be measured by assets or income not subject to direct taxation. Ours is an excise case.

haustive presentation by the now Professor Emeritus Powell, who was professor of Constitutional Law at Harvard Law School, in 44 Harv. L. Rev. 889 (April 1931).

In *Lawrence v. State Tax Com.*, *supra*, this Court held a state income tax valid which included income earned from sources outside the state in determining his taxable income, while excluding it in determining the taxable income of domestic corporations, where there is nothing to negative the possible existence of just ground for the difference. The Court said as to the nature and operation of the tax which is more important than its name:

"It is enough, so far as the constitutional power of the State to levy it is concerned, that the tax is imposed by Mississippi on its own citizens with reference to the receipt and enjoyment of income derived from the conduct of business, regardless of the place where it is carried on."

In *Schuylkill Trust Co. v. Penna.*, *supra*, this Court held that the tax discriminated against Federal securities, under the facts in the case.

In *James v. Dravo Contracting Co.*, *supra*, this Court held an occupation tax measured by gross income is not invalid where imposed by a State upon a contractor with the United States, as levying a direct burden on the Federal Government, even though the imposition of the tax may increase the cost to the government of the work contracted to be done. The tax was not a direct one laid upon the contract of the government. There was no direct interference with or burden upon the exercise of a federal right. That is the situation in the instant case. To paraphrase the significant language of Chief Justice Hughes, taxation by

either the state or the federal government affects in some measure the cost of the operation of the other. As neither government may destroy the other or control in any substantial manner the exercise of its powers, the limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum interference each with the other, and that limitation cannot be so varied or extended so as to seriously impair either the taxing power of the government imposing the tax or the appropriate exercise of the functions of the government affected by it.

Conclusion.

The judgment of the Supreme Court of New Jersey should be affirmed on the ground that the tax involved is constitutional, being upon a legitimate subject, measured by net worth, without any discrimination against Federal bonds or income.

Respectfully submitted,

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 CHARLES HANDLER,
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Dated: November 1, 1949.

Appendix "A".

R. S. 54:4-22:

"Every fire insurance company and every stock insurance company other than life insurance shall be assessed in the taxing district where its office is situate, upon the full amount of its capital stock paid in and accumulated surplus. The real estate belonging to every such corporation shall be taxed in the taxing district where situated, and the amount of assessment upon the real estate shall be deducted from the amount of any assessment upon the capital stock and accumulated surplus. No franchise tax shall be imposed upon any such fire insurance company or other stock insurance company included in this section."